

HBHQTUZ1

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 CR 536 (PGG)  
Trial

5 KALEIL ISAZA TUZMAN AND OMAR  
6 AMANAT,

7 Defendants.  
8 -----x

New York, N.Y.  
November 17, 2017  
9:50 a.m.

10  
11 Before:

12 HON. PAUL G. GARDEPHE

13 District Judge  
14 and a Jury

15 APPEARANCES

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Southern District of New York

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24 JOANNA CHRISTINE WRIGHT  
25

HBHQTUZ1

1 (Trial resumed; jury not present)

2 THE COURT: Is there anything we need to address  
3 before we begin with the testimony?

4 MR. WILLIAMS: Not from the government, your Honor.

5 MR. NAFTALIS: Your Honor, the only issue is that the  
6 defense made a motion to preclude Mr. Ingrassia.

7 THE COURT: I'm not going to discuss that now. We'll  
8 have to do it at the next break. The jury is ready.

9 I was given a proposed instruction, is it the party's  
10 wish that I read it at the outset of today's proceedings?

11 MR. JACKSON: Yes, please, your Honor.

12 MS. GRISWOLD: That's fine.

13 MR. WILLIAMS: That's fine for the government, your  
14 Honor.

15 Just one note on Mr. Ingrassia. We've whittled down  
16 the remainder of the Smyth direct, and so we expect that  
17 Mr. Ingrassia will go on before the next break.

18 THE COURT: All right. So I guess we'll have to talk  
19 about it then. In the future, if you know that, let me know,  
20 OK, because I'm going to assume what you told me is accurate  
21 until you tell me it's not accurate, and I came down to court  
22 thinking that we had at least an hour of Mr. Smyth's testimony.

23 So let's then, I guess we will have to turn to the  
24 Ingrassia issue even though the jury is ready.

25 Let me give you my reaction to what I have read.

HBHQTUZ1

1 I think that much of what the government wants to  
2 elicit from Mr. Ingrassia there's really not much argument  
3 should be precluded.

4 So what do I mean in saying that? It seems to me that  
5 the cases have uniformly held, as far as I can figure out, that  
6 testimony along the lines of -- from analysts, testimony from  
7 analysts about how they go about their job, the kinds of things  
8 they consider, what information is important to them, what they  
9 include in their reports, the degree of reliance they put on  
10 that information, whether they believe the information was  
11 truthful and the significance of certain information in making  
12 their overall evaluation of a stock, I think it's pretty clear  
13 that that is admissible. And for that proposition, I am  
14 relying on *United States v. Tomasetta*, 2012 WL 1080293. Also  
15 *United States v. Ferguson*, 2007 WL 4556625.

16 Where I am less clear is it seems apparent that the  
17 government wants to ask Mr. Ingrassia some hypothetical  
18 questions about if he had known that the revenue of KIT was  
19 inflated or if he had known certain other alleged facts, the  
20 impact that would have had on his reports, and it is less clear  
21 to me that -- first of all, the devil is in the details. I  
22 need to know what the question is, and I need to know what the  
23 answer is going to be.

24 In *Tomasetta*, which is a case which the government  
25 provides and on which the government in particular relies, the

HBHQTUZ1

1 judge did not permit the government to elicit from the  
2 analyst -- or did not permit the government to ask the analyst  
3 hypothetical questions about how different disclosures would  
4 have affected the analyst's opinion of the stock. And that was  
5 Judge Crotty.

6 The *Regis* case I've looked at, and it has been a  
7 frustrating exercise because the transcript is not available  
8 for some reason, maybe because of the age of the case, and so I  
9 don't know what exactly was elicited by the government at  
10 trial. The excerpt of the transcript from *Regis* that the  
11 government provided doesn't reveal to me whether hypothetical  
12 questions were asked or not, although the *Regis* case does  
13 provide significant support for the other elements that I  
14 discussed at the outset it seemed to me should be admitted.

15 The *Ferguson* case provides strong support for the use  
16 of hypothetical questions. The *Ferguson* case is an opinion  
17 from Judge Droney when he sat on the district court. In  
18 *Ferguson*, he says that once the government lays an appropriate  
19 foundation concerning the importance of loss reserves to  
20 understanding AIG's financial conditions at the time, once the  
21 government has offered evidence concerning the importance of  
22 receiving accurate financial information about AIG, and  
23 elicited testimony as to why it's important in terms of giving  
24 advice to clients, and also elicited that the analysts rely on  
25 AIG financial disclosures in writing reports and in making

HBHQTUZ1

1 recommendations to clients, Judge Droney goes on to say that  
2 they would be permitted -- that the analysts in that case would  
3 be permitted to testify about how their advice would have been  
4 different if they had known the withheld information.

5 So the government also cites *Cuti*. We've talked about  
6 *Cuti* before. It is true that the Second Circuit says in *Cuti*  
7 that hypothetical questions along the lines of: "If you had  
8 known this, would your views have changed?" The Court says  
9 that such questions can be "especially useful" in demonstrating  
10 the impact of fraud.

11 However, it is also fair to note that in the *Cuti*  
12 case, the Second Circuit points out that the hypothetical  
13 questions in that case were cabined by the fact that there had  
14 been a significant record established concerning, first of all,  
15 the factual foundation that was the premise for the  
16 hypothetical questions, but also the accounting rules that were  
17 at issue in that case. So the Second Circuit said that, and I  
18 quote: "Since the applicable accounting rules were explained  
19 in detail, the reasoning process that the witnesses employed in  
20 answering the hypotheticals was straightforward and transparent  
21 to the jurors who could readily discern whether the responses  
22 given were reliable." That's from *Cuti*, 720 F. 3d 458.

23 So I don't know what the hypothetical questions are  
24 going to be here. We are going to -- I have to have a  
25 conversation before the hypothetical question is asked so that

HBHQTUZ1

1 I understand what it is and what the response is going to be so  
2 that I can make a determination of whether it is appropriate  
3 under the case law

4 MR. NAFTALIS: Your Honor, I think we can do it in the  
5 time. I think they're going to be pretty basic.

6 "If you had known the revenue had been inflated, would  
7 that have been important to you?

8 "If you had known the cash balance were not accurate,  
9 would that have been important to you?

10 "If you had known there was fraud, would that have  
11 been important to you?"

12 THE COURT: And you would have laid the foundation for  
13 why those things matter, right?

14 MR. NAFTALIS: Yes.

15 THE COURT: So I'll listen to the foundation you have  
16 laid and when you reach the point where you want to ask the  
17 hypotheticals, you can approach, and I'll hear from defense  
18 counsel whether they have an objection.

19 MR. WEITZMAN: Your Honor, can I just raise two issues  
20 with respect to that?

21 THE COURT: Sure.

22 MR. WEITZMAN: The first is this is going to become a  
23 battle of hypotheticals. For example, on the 12/31/08 Maiden  
24 agreement, if they were to ask: "If you had known about this,  
25 would that affect your recommendation?" Then I get to go

HBHQTUZ1

1 through all of Maiden's cross-examination and say, "If you had  
2 known that he was going to buy in any event, if you had known a  
3 big proponent" or, you know, do all these other things. It's  
4 just a battle of hypotheticals and the risk there, here in  
5 particular, is doubly problematic because we haven't had the  
6 opportunity to cross-examine Mr. Smyth about the revenue  
7 inflation scheme that he ran, which means that we can't ask the  
8 contrary hypotheticals because this is the first witness who is  
9 talking about the revenue inflation. So even under *Cuti*, one  
10 would expect that we have a factual record on which we can  
11 either impeach or diminish the witness' testimony.

12 I think that just as a form of trial management, it is  
13 unnecessary for the jury to hear that type of testimony. The  
14 witness can say revenues were important to him. The witness  
15 can say cash accounts were important to him. He doesn't need  
16 to answer the hypotheticals when we're prejudiced because we  
17 haven't had the opportunity to cross-examine Smyth yet and  
18 establish our own factual predicate for our own hypotheticals

19 MR. JACKSON: Your Honor, may I just briefly say, I do  
20 agree with Mr. Weitzman's point, but my real issue is, I think  
21 that of the three examples that Mr. Naftalis gave, one of those  
22 is not like the other.

23 "If you had known X," he did two factual conclusions  
24 and then he did one legal conclusion. I think it's a very  
25 different question to say "if you had known there was fraud."

HBHQTUZ1

1 I don't know if that was just a casual sort of use of language,  
2 but if you had known there was fraud basically assumes the  
3 legal question that the jury has to make a determination about,  
4 so I think that's a different type of question.

5 THE COURT: So is it your intention to ask these  
6 hypothetical questions or to ask hypothetical questions?

7 MR. NAFTALIS: Yes, along those lines. The fraud is  
8 grounded in the fact that the defendant has certified there is  
9 no fraud. So "if you had known that this certification were  
10 false, would that have been important?"

11 Just responding to the *Cuti* issue: If Mr. Weitzman  
12 wants to ask hypotheticals, we have no objection. If he wants  
13 to recall this witness in his case, we have no objection. If  
14 he wants to call other analysts in his case we have no  
15 objection. But he has cited no cases that say this is  
16 inappropriate.

17 In fact, the cases we rely on say this is the best way  
18 to sort of instruct the jury as to whether these things matter.  
19 We're not asking complicated ones or reaching ones. We're just  
20 sort of asking basic high-level questions.

21 "If this were not true, would that have been important  
22 to you? Yes or no. Why?"

23 We're not going into sort of the details of accounting  
24 policies or anything. We're trying to keep it really short.

25 Again, if they would like to spend time with him



HBHQTUZ1

1 posing hypotheticals, we believe *Cuti* permits it. So if they  
2 want to do that, that's fine. If they want to call a dozen  
3 experts or a dozen analysts on their case and do it, we have no  
4 objection.

5 MR. WEITZMAN: Your Honor, I would note that they  
6 haven't proffered any accounting testimony on revenue  
7 recognition yet, so the *Cuti* caveat that you focused on has not  
8 yet been established as a factual predicate in this case.

9 THE COURT: It is not a caveat, but it certainly is a  
10 factor that the Second Circuit described in some detail.

11 MR. WEITZMAN: Right, your Honor.

12 THE COURT: So I think we can infer from that that  
13 they viewed it as important.

14 MR. NAFTALIS: On that issue, just to be clear, we've  
15 elicited through Mr. Smyth, I think, and Mr. Mullin that in the  
16 10-K that Mr. Isaza Tuzman signed, the revenue recognition  
17 policy is laid out, and Mr. Smyth has already testified about  
18 application of the revenue recognition policy. So I think  
19 there is a factual basis for all of this.

20 THE COURT: All right. I'm prepared to rule on the  
21 matter. If the government is going to ask hypothetical  
22 questions of Mr. Smyth, I'm not going to permit Mr. Ingrassia  
23 to be called out of turn. The reason for that is that the  
24 premise for the hypothetical questions would be Smyth's  
25 testimony and Smyth's testimony has not been tested by

HBHQTUZ1

1 cross-examination yet.

2 If Ingrassia was just going to testify about the  
3 matters that I talked about at the outset, that doesn't  
4 implicate Smyth's testimony. It does no more than say what is  
5 important to me as an analyst. However, if we're going to go  
6 beyond that and we're going to get into hypothetical questions  
7 that then rely on the accuracy of what Smyth has said and  
8 Smyth's testimony has not been tested by cross-examination yet,  
9 I find that troubling.

10 So you can tell me what you want to do. If you want  
11 to elicit the hypothetical questions, I'm not going to hear him  
12 out of turn.

13 MR. NAFTALIS: Your Honor, we'll proceed. I mean, we  
14 take what your Honor has said. We know we are not going to  
15 convince you, but we do think the fact that Mr. Smyth has  
16 testified to all of this stuff he did lays the factual  
17 predicate. If they want to cross him, it doesn't mean that the  
18 factual predicate has gone away. Let's assume they had a great  
19 cross --

20 THE COURT: I have already --

21 MR. NAFTALIS: I know we are not going to convince  
22 you.

23 THE COURT: I told you why I think it's unfair.  
24 You're not going to change my mind on that. I would have no  
25 problem with Ingrassia testifying if his testimony was not

HBHQTUZ1

1 going to get into hypothetical questions that are premised on  
2 the accuracy of Mr. Smyth's testimony.

3 If you're going to do that and that testimony hasn't  
4 been tested yet, that strikes me as unfair and problematic.

5 So I leave it up to you. Do you want to call him  
6 later after Smyth's examination is over?

7 MR. NAFTALIS: I mean, he's here sitting outside, so  
8 we'd like to call him and reserve the right to recall him if we  
9 want to go back to the hypotheticals.

10 I don't know whether we will in the end, but the man  
11 flew in and he's out front.

12 THE COURT: I am sensitive to the inconvenience, but  
13 ultimately my primary duty is to ensure the defendants get a  
14 fair trial. And for the reasons I've explained, I'm concerned  
15 that hypotheticals premised on a direct that hasn't been tested  
16 by cross, troubles me. I find it troubling and problematic.

17 MR. NAFTALIS: Can I simply ask "would it have been  
18 important to you to know this" and then leave it, as opposed to  
19 "how would this have changed your opinion"?

20 THE COURT: You can elicit from him what is important  
21 in making his evaluations of a stock, including income,  
22 revenue, I don't know what exactly -- what things you're going  
23 to bring out through him, but you certainly can elicit from  
24 him--

25 MR. NAFTALIS: I will do that.

HBHQTUZ1

Smyth - Direct

1 THE COURT: -- that matters of this sort are important  
2 in reaching evaluation of a stock.

3 But what you would not be permitted to do is then  
4 proceed to the hypothetical asking him would his evaluation  
5 have been different if he had known X.

6 MR. NAFTALIS: Understood.

7 THE COURT: So you want to proceed with him today?

8 MR. WILLIAMS: Yes.

9 THE COURT: OK.

10 MR. WEITZMAN: Thank you, your Honor.

11 THE COURT: Can we bring in the witness and the jury,  
12 please.

13 MR. WILLIAMS: Yes, your Honor.

14 (Jury present)

15 THE COURT: Please be seated.

16 Good morning, ladies and gentlemen and gentlemen.

17 THE JURY: Good morning.

18 THE COURT: We are going to be continuing with the  
19 direct examination of Mr. Smyth.

20 Mr. Smyth, you remain under oath.

21 ROBIN SMYTH, resumed,

22 DIRECT EXAMINATION CONTINUED

23 BY MR. WILLIAMS:

24 THE COURT: Mr. Williams, please proceed.

25 MR. WILLIAMS: Thank you, your Honor.

HBHQTUZ1

Smyth - Direct

1 Q. Welcome back, Mr. Smyth.

2 MR. WILLIAMS: Ms. Pyun, can we please pull up  
3 Government Exhibit 2781.

4 Q. Now, Mr. Smyth, when we left off two days ago, you had just  
5 testified about this assurance note that you received from  
6 Mr. Isaza Tuzman, and I asked you why you had asked Mr. Isaza  
7 Tuzman to put an assurance note in an email in order for you to  
8 sign the 10-K. Do you recall that?

9 A. Yes.

10 Q. And do you recall that you said that you wanted evidence  
11 that Mr. Isaza Tuzman knew what had happened in the company?

12 A. Yes.

13 Q. Now, what did you mean when you said you wanted evidence  
14 that he knew what had happened in the company?

15 A. If at any future time there was an investigation either  
16 internally or externally with the SEC or prosecutors, I wanted  
17 to have that email for evidence.

18 Q. Mr. Smyth, did there come a time when Mr. Isaza Tuzman kept  
19 his promise to get \$8 million into KIT digital to fill up the  
20 escrow accounts?

21 A. Yes.

22 Q. When did he do that?

23 A. April 2012.

24 Q. When was the 10-K signed?

25 A. March 2012.

HBHQTUZ1

Smyth - Direct

1 MR. WILLIAMS: I want to show you Government Exhibits  
2 2174-A, 2180-A, 2184-A through C. So let's pull up 2174-A  
3 first.

4 Q. Mr. Smyth, what is this?

5 A. That is a BBM exchange between myself and Rima Jameel.

6 MR. WILLIAMS: Let's pull up Government Exhibit  
7 2180-A.

8 Q. What is this?

9 A. That is BBM exchange between Kaleil, myself and Gavin  
10 Champion.

11 MR. WILLIAMS: Pull up 2184-A.

12 Q. What is 2184-A?

13 A. BBM exchange between Kaleil myself and Gavin Champion.

14 MR. WILLIAMS: Let's look at 2184-B.

15 Q. What's that?

16 A. Again, BBM exchange between Kaleil, myself and Gavin  
17 Champion.

18 MR. WILLIAMS: Let's look at 2184-C.

19 Q. What is that?

20 A. Again, a BBM exchange between Kaleil, myself and Gavin  
21 Champion.

22 MR. WILLIAMS: We offer Government Exhibits 2174-A,  
23 2180-A, 2184-A through C.

24 MR. McRAE: No objection.

25 MR. JACKSON: No objection.

HBHQITUZ1

Smyth - Direct

1 THE COURT: 2174-A, 2180-A, 2184-A through C are  
2 received.

3 (Government's Exhibits 2174-A, 2180-A, 2184-A through  
4 2184-C received in evidence)

5 MR. WILLIAMS: Permission to publish, your Honor.

6 THE COURT: Yes.

7 Q. Let's pull up Government Exhibit 2180-A.

8 Mr. Smyth, can you please read the first four messages  
9 that Mr. Isaza Tuzman sent to you on April 7 of 2012.

10 A. "First post Sabbath message from my bank relationship  
11 manager at Emirates Bank (who is Christian) saying they're off  
12 tomorrow for Easter. While sitting here at airport going to  
13 Dubai. Good news is that they're confirmed to meet me at  
14 branch Monday morning and re-confirmed first wire can go out  
15 right away if I am there in person. You guys there?"

16 Q. Mr. Smyth, in the third message, Mr. Isaza Tuzman  
17 references a wire. What wire did you understand him to be  
18 referencing?

19 A. The first wire he had alluded to in the -- or said in the  
20 email message to me, the \$3.5 million.

21 Q. Where did you understand that wire to be going to?

22 A. To the escrow account held by Rima.

23 Q. Now, Mr. Smyth, why didn't you ask Mr. Isaza Tuzman to send  
24 the \$3.5 million directly to KIT digital?

25 A. Because the amount owed was from -- from that escrow

HBHQTUZ1

Smyth - Direct

1 account, and if it had come directly from Kaleil, questions  
2 would have been asked as to why Kaleil was sending that amount  
3 to them.

4 Q. OK. Now at 2:38 p.m. you wrote, "I would like a call  
5 between the three of us to discuss where we are now."

6 Do you see that?

7 A. Yes.

8 Q. What did you mean by "where we are now"?

9 A. I wanted to know where the -- what process was for the  
10 balance of the \$8 million and what we were going to be doing  
11 about the back end.

12 Q. When you say "we," who are you referring to?

13 A. Kaleil, Gavin and myself.

14 Q. Now, nine seconds later, Mr. Isaza Tuzman wrote, "You saw  
15 my update on Dubai wire above, yes?"

16 And then you responded, "Yes."

17 And then you said, "Hopefully second wire there as  
18 well."

19 Do you see that?

20 A. Yes.

21 Q. A few lines down, Mr. Isaza Tuzman says, "Second wire: I  
22 don't know. It wasn't there on Thursday."

23 And then he wrote, "But that was expected as it didn't  
24 leave Colombia until Tuesday afternoon".

25 Now, Mr. Smyth, why were you and Mr. Isaza Tuzman



HBHQTUZ1

Smyth - Direct

1 talking about the timing of wire transactions?

2 A. The wires needed to be received by the escrow account --  
3 Rima in the escrow account as quickly as possible because there  
4 was pressure on, and we were running out of time to be able to  
5 send the \$8 million back to KIT digital.

6 Q. Mr. Smyth you just said that there was pressure on.  
7 Pressure from who?

8 A. Joe Mullin.

9 Q. And what do you mean by there was pressure from Joe Mullin?

10 A. There was pressure that the money that was in the escrow  
11 account be returned to KIT digital.

12 Q. Would you remind the jury just briefly who Joe Mullin was?

13 A. He was a director of KIT digital as well as chairman of the  
14 audit committee.

15 Q. Now, let's look at what you wrote to Mr. Isaza Tuzman at  
16 2:45 p.m. You wrote, "Are you going to Dubai now anyway I  
17 would be happier you down there to do as much as possible to  
18 get it moving."

19 What did you mean when you said you would be "happier  
20 with you down there to do as much as possible to get it  
21 moving"?

22 A. It's always easier to deal with banks if you want something  
23 done if you're there in person rather than communicating when  
24 you're not there.

25 Q. And so who, if anyone, did you want in person at the bank?

HBHQTUZ1

Smyth - Direct

1 A. Kaleil.

2 Q. Now, can you please read what you then wrote at 2:49:07?

3 A. "Third wire if that could go direct to Rima would be a  
4 bonus as the time delay long and it will be asked for soon."

5 Q. What did you mean when you said, "It will be asked for  
6 soon"?

7 A. The -- again, the expectation was that it needed to get  
8 back into KIT digital, the amount that was in the escrow  
9 account.

10 Q. Mr. Isaza Tuzman then wrote, "I am going to Dubai anyway, I  
11 need to be there for Monday morning."

12 Mr. Smyth did you know why Mr. Isaza Tuzman was  
13 traveling to Dubai?

14 MR. McRAE: Objection, your Honor. Foundation.

15 THE COURT: Sustained.

16 BY MR. WILLIAMS:

17 Q. Mr. Smyth, did Mr. Isaza Tuzman and you speak about any  
18 meetings that he had in Dubai for Monday morning?

19 A. No.

20 Q. And so did you know why he was going to Dubai?

21 MR. McRAE: Objection. Lack of foundation.

22 THE COURT: Overruled.

23 A. No.

24 Q. OK. Now, Mr. Smyth, you testified that the \$8 million was  
25 traveling from Colombia to Dubai and then to KIT digital. Did

HBHQTUZ1

Smyth - Direct

1 you speak with Rima Jameel about those logistics?

2 A. Yes.

3 MR. WILLIAMS: Let's pull up Government Exhibit  
4 2174-A.

5 Q. Now, Mr. Smyth these are BBM messages from you and Rima  
6 Jameel also in April of 2012, so this is just days after the  
7 last exchange we were looking at. Can you please read what you  
8 wrote to Rima Jameel at 2:42 a.m.

9 A. "Has money hit now?"

10 Q. What did you mean by "Has money hit now"?

11 A. Had the money that Kaleil was sending into the escrow  
12 account been received by the bank yet.

13 Q. Now, in response, she said, "Yes all of it \$3 million.  
14 Shall we send to New York or Dubai."

15 Do you see that?

16 A. Yes.

17 Q. And where did you tell her to send the money to?

18 A. New York.

19 Q. When you refer to New York, what are you referring to?

20 A. The KIT digital account held in New York.

21 Q. OK. Now at 3:09 and 22 seconds, you also wrote, "Let me  
22 know when the 5 million hits."

23 Do you see that?

24 A. Yes.

25 Q. What were you referring to?

HBHQTUZ1

Smyth - Direct

1 A. 5 million was the balance of the 8 million Kaleil had  
2 committed to send to the escrow account.

3 Q. Then at 3:09 and 49 seconds, Rima Jameel wrote, "Kaleil is  
4 sending to me we will lose time on that".

5 Do you see that?

6 A. Yes.

7 Q. What were you and Rima Jameel discussing here?

8 A. The timing of the \$5 million being received into the escrow  
9 account and then the turnaround to New York.

10 Q. OK. Let's jump ahead to 7:18 and 17 seconds.

11 You wrote to Rima Jameel, "Did you het confirm from  
12 bank?" Is there a typo in that message?

13 A. Yes.

14 Q. What did you intend to say?

15 A. "Get."

16 Q. "Did you get confirm from bank?"

17 A. Correct.

18 Q. What did you mean by "get confirm from bank"?

19 A. I wanted the -- her to let me know if she had the  
20 confirmation, the actual receipt from the bank.

21 Q. Then she responded, "yes funds gone."

22 Now, Mr. Smyth, later on at -- on April 19 at 8:47,  
23 you wrote to Rima Jameel, "Has the five hit your account yet?"

24 Do you see that?

25 A. Yes.

HBHQTUZ1

Smyth - Direct

1 Q. What were you referring to when you said, "Has the five hit  
2 your account yet"?

3 A. The same \$5 million which was the balance of the  
4 \$8 million.

5 Q. And she wrote back, "No, not yet."

6 See that?

7 A. Yes.

8 Q. Then a few days later, you wrote to her again and say, "Has  
9 five million hit today?"

10 Do you see that?

11 A. Yes.

12 Q. What were you referring to when you asked if the "five  
13 hit"?

14 A. The same \$5 million which I was expecting to be sent to the  
15 escrow account.

16 Q. Now, Rima Jameel responded, "Yes, it hit. I have prepared  
17 instruction to send to KIT New York based on instruction from  
18 Lou but it won't get processed until after New York banks open  
19 tomorrow at five which means not till Tuesday."

20 Now, Mr. Smyth, who is Lou?

21 A. Lou Schwartz was -- I think at that stage he had changed --  
22 he used to be in charge of -- he worked for KIT. He used to be  
23 in charge of the American -- America operations, but I think  
24 then he was acting as general counsel.

25 Q. What, if anything, did Lou have to do with the escrow money

HBHQTUZ1

Smyth - Direct

1 coming back into KIT digital?

2 A. He was asking Rima for the 5 million to be sent back to  
3 KIT. There was more pressure on now from Lou Schwartz as well  
4 for that \$5 million to be sent which was the balance of the  
5 amounts in escrow accounts in Dubai.

6 Q. Now, Mr. Smyth, did you speak with Mr. Isaza Tuzman about  
7 the \$8 million after he started initiating the wires?

8 A. Yes.

9 MR. WILLIAMS: Let's look at Government Exhibit  
10 2184-A.

11 Q. Now, these are BBM messages between you, Gavin Campion and  
12 Mr. Isaza Tuzman on April 25 and 26.

13 So at 9:32 a.m., he wrote to you, "Would really like  
14 to speak. Sorry to keep bothering." Then he gives a phone  
15 number. Did you write back or can you read what you wrote back  
16 in response?

17 A. "I keep getting dragged onto calls."

18 Q. Then he wrote, "OK. Am meeting Petr and Gavin tonight and  
19 want to strategize."

20 Who is Petr in that message?

21 A. Petr Stransky.

22 Q. Mr. Smyth, had you previously spoken with Mr. Isaza Tuzman  
23 about why he was meeting with Petr Stransky?

24 A. Yes.

25 Q. What did he say about why he was meeting Petr Stransky?

HBHQTUZ1

Smyth - Direct

1 A. They were meeting on the content services sale from KIT  
2 digital.

3 Q. Just very, very briefly, can you tell the jury what content  
4 services was and what the sale was?

5 A. Petr Stransky ran the operation of content services, and we  
6 were preparing to sell content services to Petr Stransky out of  
7 KIT similar to the sale of Visual which would have included all  
8 the uncollectible revenue under the fake perpetual licenses.

9 Q. Did that sale ultimately happen, Mr. Smyth?

10 A. It did.

11 Q. When?

12 A. June 2012.

13 MR. WILLIAMS: You can jump to the next page, Ms.  
14 Pyun.

15 Q. Now, at 9:47 a.m., Mr. Isaza Tuzman wrote, "Did 5 million  
16 get received by KIT?"

17 Then he goes on to write, "Also, do you know what's  
18 happening with my transition agreement? Had counted on this.  
19 Even in loaning Tomas money."

20 Do you see that?

21 A. Yes.

22 Q. What was the 5 million or what was your understanding of  
23 what Mr. Isaza Tuzman meant by "5 million get received by KIT"?

24 A. He wanted to know whether the 5 million that he sent to the  
25 escrow account had been sent to KIT and been received by KIT

HBHQTUZ1

Smyth - Direct

1 digital, New York.

2 Q. Please read the next two messages that you wrote.

3 A. "Yes \$5 million landed. No, I have no visibility on your  
4 transition agreement."

5 Q. Now, Mr. Isaza Tuzman then wrote, "Good on 5 million. That  
6 8 million has me fending for my life."

7 What did you understand Mr. Isaza Tuzman to mean when  
8 he said "the \$8 million has me fending for my life"?

9 MR. McRAE: Objection. Speculation.

10 THE COURT: Sustained.

11 Q. Mr. Smyth, did you speak with Mr. Isaza Tuzman about where  
12 he had received -- obtained the \$8 million?

13 A. Yes.

14 Q. What did he tell you?

15 A. He had borrowed it from people in Colombia.

16 Q. And what, if anything, did he say about whether or not that  
17 borrowing \$8 million from people in Colombia had any impact on  
18 him?

19 MR. McRAE: Objection. Leading, your Honor.

20 THE COURT: Overruled.

21 A. He said that he really needed to pay back the money to  
22 those people in Colombia.

23 Q. And did he explain why?

24 A. I just -- not in a lot of words, but --

25 MR. McRAE: Objection.



HBHQTUZ1

Smyth - Direct

1 THE COURT: Sustained.

2 MR. McRAE: Thank you.

3 THE COURT: The question was did he explain why.

4 THE WITNESS: Not really.

5 Q. Now, Mr. Smyth, after Mr. Isaza Tuzman wired \$8 million  
6 from Colombia, did you tell your auditors that there was an  
7 \$8 million hole in the escrow accounts?

8 A. No.

9 Q. After he wired that \$8 million in from Colombia, did you  
10 tell your board of directors that there was a \$8 million hole  
11 in your accounts?

12 A. No.

13 Q. After he wired that money from Colombia, did you tell Joe  
14 Mullin that there was a \$8 million hole in your accounts?

15 A. No.

16 Q. And after he wired that money from Colombia, did you tell  
17 your investors that there was a \$8 million hole in your  
18 accounts?

19 A. No.

20 Q. Why didn't you tell those people the truth?

21 A. Because Kaleil had filled the hole with the \$8 million.

22 MR. WILLIAMS: No further questions.

23 THE COURT: All right.

24 MR. JACKSON: Excuse me, your Honor.

25 THE COURT: Yes.

HBHQTUZ1

Smyth - Direct

1 MR. JACKSON: May we request at this time that the  
2 Court provide the limiting instruction we discussed?

3 THE COURT: Yes.

4 Ladies and gentlemen, I'm going to read an instruction  
5 to you about some of the evidence that you've heard recently.  
6 The instruction is as follows:

7 You have heard evidence related to alleged accounting  
8 fraud at KIT digital. Some of this evidence has referenced  
9 Enable, a company about which you have heard evidence. You  
10 should be aware that Omar Amanat is not charged in Counts Five  
11 and Six of the indictment which relate to alleged improper  
12 transactions in accounting at KIT digital. I will give you  
13 further instructions on all of the counts of course at the  
14 conclusion of the case.

15 Now, is it the lawyers wish at this point --

16 Mr. McRae, something you wanted to say?

17 MR. McRAE: Yes, your Honor. I was going to ask if we  
18 could very briefly approach. It will just take a second.

19 THE COURT: OK.

20 (Continued on next page)

HBHQTUZ1

Smyth - Direct

1 (At the side bar)

2 MR. McRAE: I just wanted to confirm that now that  
3 Mr. Smyth has been tendered, the government will respect the  
4 admonition that they not communicate with him nor have his  
5 counsel communicate with him either directly or indirectly.

6 I understand we are going to have a witness taken out  
7 of order, but I wanted to make sure that that expectation and  
8 admonition were in play, and I didn't want to do it in front of  
9 the jury.

10 MR. WILLIAMS: That's fine, your Honor. I think  
11 Mr. McRae misspoke. He said nor have his lawyer communicate  
12 with him or Mr. Smyth communicate with his lawyer, but the  
13 government is not going to communicate with Mr. Smyth's lawyer.

14 MR. McRAE: That's what I meant, either direct or  
15 indirect.

16 THE COURT: OK.

17 MR. McRAE: Thank you, your Honor.

18 (Continued on next page)  
19  
20  
21  
22  
23  
24  
25

HBH9TUZ2

Ingrassia - direct

1 (In open court)

2 THE COURT: Ladies and gentlemen, we're going to break  
3 into Mr. Smyth's testimony at this point to take testimony from  
4 a witness who has traveled a distance to get here and who has  
5 been waiting to testify for some time.

6 So, Mr. Smyth, you can step down, sir. And the  
7 government will call that witness, please.

8 MR. NAFTALIS: Yes, your Honor. The government calls  
9 Richard Ingrassia.

10 RICHARD ALAN INGRASSIA,

11 called as a witness by the Government,

12 having been duly sworn, testified as follows:

13 MR. NAFTALIS: Your Honor, may I inquire?

14 THE COURT: Yes, please.

15 DIRECT EXAMINATION

16 BY MR. NAFTALIS:

17 Q. Mr. Ingrassia, where do you live?

18 A. I live in Lake Forest, California.

19 Q. How far did you go in school?

20 A. I was undergraduate, University of Notre Dame and then  
21 graduate School of Journalism at Northwestern University.

22 Q. Are you familiar with a company called ROTH Capital?

23 A. Yes.

24 Q. How?

25 A. I was equity research analyst there from 2002 to 2013.

HBH9TUZ2

Ingrassia - direct

1 Q. And can you tell the jury what type of a firm ROTH Capital  
2 is?

3 A. ROTH Capital is an investment bank.

4 Q. What is an investment bank generally?

5 A. An investment bank helps companies raise money and  
6 publishes research reports to help investors make better  
7 decisions on stocks.

8 Q. Pull the microphone a little closer. It's a little hard to  
9 hear in this courtroom.

10 Where is Roth based?

11 A. In Newport Beach, California.

12 Q. Now, you said you were an equity research analyst at Roth  
13 during your time there?

14 A. Yes.

15 Q. Can you explain to the jury in general terms what an equity  
16 research analyst is?

17 A. An equity research analyst studies companies, reads their  
18 filings, talks to management, customers, suppliers,  
19 competition, and then publishes reports on those companies to  
20 help investors make better decisions. And most of those  
21 reports center around establishing a valuation for that company  
22 and a recommendation of either a buy, a sell, or a hold.

23 Q. Just to go through some of what you said. What type of  
24 companies did you cover at Roth?

25 A. At ROTH Capital's specialty was in small cap and micro cap

HBH9TUZ2

Ingrassia - direct

1 companies, meaning companies generally under five hundred  
2 million in valuation.

3 Q. Were these public or private companies?

4 A. Public.

5 Q. And you said you would give recommendations about whether  
6 to buy, sell, or hold. Can you explain what those concepts  
7 mean?

8 A. Sure. So a buy would mean that when I estimated the value  
9 of that company it was in my opinion greater than where it was  
10 trading in the market at the time. And obviously vice versa on  
11 a sell rating. I would value it. If I thought it was  
12 overvalued, then that would qualify to be a sale rating.

13 Q. Did you focus on any particular types of companies?

14 A. Yes. Almost all in media, media-related technologies, and  
15 internet technologies.

16 Q. And how many companies -- in your business as an equity  
17 research analyst are you familiar with the word cover?

18 A. Yes.

19 Q. What does cover mean in this field?

20 A. Cover means doing what I just described, which is writing  
21 research and studying companies.

22 Q. How many covers -- excuse me. How many companies did you  
23 cover at any one time?

24 A. It varied but typically not more than fifteen. I'd say  
25 twelve to fifteen on average.

HBH9TUZ2

Ingrassia - direct

1 Q. And how closely did you follow the companies that you were  
2 covering?

3 A. As closely as I possibly could.

4 Q. Mr. Ingrassia, are you familiar with a company called KIT  
5 digital?

6 A. Yes.

7 Q. How?

8 A. I covered the company while I was at Roth roughly I think  
9 2009 to 2013.

10 Q. And who was the CEO of KIT when you covered the company?

11 A. Kaleil Isaza Tuzman.

12 Q. Did you ever meet Mr. Tuzman?

13 A. Yes.

14 Q. Now, in covering KIT digital and other companies what types  
15 of information did you consider in doing your research?

16 A. Well, it would be a lot of different information.

17 Primarily it would be their publicly filed financial  
18 statements. Obviously anything on their website. Again, like  
19 I said, I would interview customers and suppliers and others  
20 outside but analysts are generally restricted only to the  
21 information that's publicly available. So that's what I had to  
22 rely on.

23 Q. When you said publicly filed financial statements, do you  
24 mean the company's SEC filings?

25 A. Yes. So 10-Ks or annual reports, quarterly reports, the

HBH9TUZ2

Ingrassia - direct

1 10-Qs and then 8-Ks and other filings, various events during  
2 the company's history.

3 Q. Now between -- you said you covered KIT between 2009 and  
4 2013 approximately?

5 A. Yeah, I think that's right.

6 Q. Did you review KIT's 10-Ks, 10-Qs and 8-Ks at that time, at  
7 the time they were released?

8 A. Yes.

9 Q. In reviewing these SEC filings, did you focus on any  
10 particular parts of them in doing your research on KIT digital?

11 A. Primarily it would be the statements themselves, the income  
12 statement, the balance sheet, the cash list statement also the  
13 management's discussion and analysis. I would read them all  
14 but those were the areas that were most important.

15 Q. Whether you said the balance sheet, the income statement,  
16 cash list statement, are those the financial statements of the  
17 company?

18 A. Yes.

19 Q. And why did you focus on the financial statements of the  
20 company?

21 A. Well, the type of analyst I was, I valued a company based  
22 on their discounted cash flow projections. And so  
23 understanding the financials was most important to me actually  
24 setting what I thought was a fair value on the company.

25 Q. We don't need to get into the detail but when you say



HBH9TUZ2

Ingrassia - direct

1 discounted cash flow, just in very general terms what does that  
2 mean?

3 A. So it's -- it's the cash flow of a company over a period of  
4 time. I typically looked at five years.

5 Q. Is that just basically a type of analysis you did?

6 A. Sorry. It's a methodology for valuing stocks.

7 Q. Did you rely on KIT digital and other companies' financial  
8 statements being accurate in your work?

9 A. Absolutely.

10 Q. Can you explain to the jury why.

11 A. Like I said, as an analyst I'm really only privy to the  
12 information that's filed publicly. So there is no other  
13 information I can go on to set my valuation and create my  
14 models.

15 Q. Focusing on KIT digital, were any particular financial  
16 metrics important to you in doing your research?

17 A. Yeah. I would say -- I mean the big ones are revenue,  
18 operating income, net income to some extent. I would say in  
19 KIT digital's case in particular revenue was probably most  
20 important because they were -- they were making a lot of  
21 acquisitions in a rapid -- in a short period of time. And  
22 understanding the difference between what was acquired revenue  
23 and what was organic revenue was important to me.

24 Q. Can you explain to the jury the difference between organic  
25 revenue and acquired revenue.

HBH9TUZ2

Ingrassia - direct

1 A. So organic revenue is revenue or sales generating --  
2 generated by the company that existed before an acquisition.  
3 So essentially just apples to apples comparison from one period  
4 to another.

5 Nonorganic would be anything that was added during  
6 that period that might throw off the total.

7 MR. NAFTALIS: Ms. Pyun, can you please bring up  
8 Government Exhibit 218 in evidence.

9 Q. And Mr. Ingrassia, it's going to come up on a screen in  
10 front of you.

11 MR. NAFTALIS: Ms. Pyun if you can show the top so we  
12 can see the date of this.

13 Q. Do you see that this document says form 10-K for the period  
14 ending December 31, 2011 for KIT digital?

15 A. Yes.

16 Q. Do you recognize this document?

17 A. Yes.

18 Q. Did you review it at the time it was released by KIT  
19 digital?

20 A. I mean it's hard to say -- I mean I'm sure I did.

21 Q. Did you review the 10-K?

22 A. I always reviewed the 10-Ks.

23 MR. NAFTALIS: Ms. Pyun, let's go to page F4 of the  
24 10-K.

25 Q. And looking at the top do you see it says, "Consolidated

HBH9TUZ2

Ingrassia - direct

1 Statements of Operations and Comprehensive Loss"?

2 A. Yes.

3 Q. Can you explain to the jury what we are looking at here.

4 A. So this is the income statement that I mentioned. So this  
5 is the high level summary of the company's sales, all their  
6 expenses, and then ultimately the earnings that they generated  
7 per share in those periods.

8 Q. So this is part of the financial statements that KIT  
9 digital released?

10 A. Right.

11 Q. And what is the very top line in the -- in this statement?

12 A. Revenue.

13 Q. And just explain to the jury, it says revenue, and then  
14 there are certain years 2011, 2010, 2009. What is listed for  
15 each of those?

16 A. So revenue for 2011 was reported at 214,932,000.

17 In 2010 it was 106,597,000.

18 And in 2009 47,284,000.

19 Q. So it's going up over time?

20 A. Yes.

21 Q. For each of those numbers did you rely on what KIT digital  
22 said its revenue was to be accurate?

23 A. Of course. Yes.

24 Q. And, again, why?

25 A. I don't really have access to anything else that would tell

HBH9TUZ2

Ingrassia - direct

1 me otherwise -- I don't have anything else to go on and I build  
2 my models based on this and my valuation.

3 MR. NAFTALIS: Ms. Pyun, can we go back a page to page  
4 F3.

5 Q. Let's look at the very top of the page. It says  
6 consolidated balance sheets. Do you see that, Mr. Ingrassia?

7 A. Yes.

8 Q. So what are we looking at here?

9 A. So these are asset and liability accounts totals for the  
10 end of this period; assets being items like cash and  
11 investments and liabilities meaning mostly debts.

12 Q. Is this another piece of KIT digital's financial  
13 statements?

14 A. Yes.

15 Q. And it says assets on top and then it says current assets.  
16 What's the first current asset listed?

17 A. Cash and cash equivalents.

18 Q. Can you just explain to the jury what cash and cash  
19 equivalents are.

20 A. It's pretty much the way it sounds. It's how much money is  
21 in the bank liquid, you know, cash available for withdraw.

22 Q. For the period ending December 31, 2011 KIT digital says  
23 that there is 45,660,000; is that right?

24 A. Yes. That's what it says.

25 Q. Then for the prior year it was 141,233,000?

HBH9TUZ2

Ingrassia - direct

1 A. Yes. Correct.

2 Q. Did you rely on what KIT digital said its cash and cash  
3 equivalents were to be accurate?

4 A. Yes. Obviously the amount of cash would be added directly  
5 to my valuation of the company's cash flows.

6 Q. And you've used the word "valuation" a few times. What do  
7 you mean by valuation?

8 A. So that's my estimate of what -- of the fair value of the  
9 company. I'm not sure how to explain it real clearly. It's  
10 what I think the company is worth. Not necessarily what the  
11 company is trading for on the stock market.

12 Q. So as an example let's say GE for example. If GE is  
13 trading at, I don't even know, ten dollars today. On the stock  
14 market, when you say what the valuation of GE is, can you just  
15 explain in context what you mean by that?

16 A. Sure. If I say look at General Electric's financial  
17 statements and create a model and run my estimates, I might,  
18 for example, establish that I think the fair value based on my  
19 projections is \$20 a share and in that case with the stock just  
20 at 10 that would qualify as a company that I would say is a  
21 buy.

22 Q. Because you think there is upside?

23 A. Right.

24 MR. NAFTALIS: Ms. Pyun, could we go forward to page  
25 F12.

HBH9TUZ2

Ingrassia - direct

1 Q. At the very top of the page it says "Notes to Consolidated  
2 Financial Statements," and then below that it says "Summary of  
3 Significant Accounting Policies."

4 Can you explain to the jury where we are in KIT  
5 digital's 10-K?

6 A. So these would be the footnotes to the financial  
7 statements.

8 Q. And what are footnotes to financial statements?

9 A. Just details that explain how some of the numbers were  
10 arrived on the -- either the income statement or the balance  
11 sheet.

12 Q. And in particular where it says, Summary of Significant  
13 Accounting Policies," what do you understand to be in this  
14 section of the footnotes?

15 A. The way it sounds. There are different ways to, for  
16 example, recognize revenue. And this is the company explaining  
17 to shareholders or any other interested party exactly how they  
18 do that.

19 Q. You noted it says revenue recognition, and we're not going  
20 to read the whole paragraph there, but during your work between  
21 2009 and '13 did you review how KIT digital represented it was  
22 recognizing revenue to its shareholders?

23 A. You know, I did and -- but probably did the most of that,  
24 most of that kind of analysis early on when I initiated  
25 coverage on the company. Later I would just really look for

HBH9TUZ2

Ingrassia - direct

1 any changes in the revenue recognition policy as time went on.

2 Q. When you say "initiate coverage," what do you mean?

3 A. That would be the first report that I wrote on the company  
4 where I established my first opinion on the fair value and  
5 whether I thought it was a buy, a hold, or a sell.

6 Q. Just unpack that for the jury. When you first start  
7 coverage, you were looking at how the company disclosed its  
8 recognizing revenue?

9 A. Right.

10 Q. And then going forward what do you do with respect to these  
11 disclosures and subsequent filings?

12 A. So what I like to -- I mean what's important to me is how  
13 conservative or aggressive a company is and how they report  
14 their revenues. And I just personally like to see a more  
15 conservative approach to doing that. So I would look to see if  
16 that had been changed in any way to a more aggressive policy  
17 because that can sometimes distort the comparison of financial  
18 statements from one period to another.

19 Q. Did you rely on how KIT digital represented it was  
20 recognizing revenue to be true?

21 A. Yes.

22 Q. Again, why?

23 A. Like I relied on most things in the financial statements.  
24 If it's not true here, then everything that I based my  
25 estimates on and my valuation could possibly be wrong or

HBH9TUZ2

Ingrassia - direct

1 misconstrued.

2 MR. NAFTALIS: Ms. Pyun, let's go to the -- I think  
3 it's the third to last page which is Exhibit 31.1 to the 10-K.

4 Q. This on top, Mr. Ingrassia, says, "Certification of CEO  
5 Pursuant to Section 302 of the Sarbanes-Oxley Act of 2002."

6 Do you see that?

7 A. Yes.

8 Q. Generally what are we looking at here?

9 A. This is a statement that the CEO has to sign to verify that  
10 the -- that everything in this document is accurate.

11 Q. And who is it signed by in this case?

12 A. Kaleil Isaza Tuzman.

13 Q. And in particular you said you rely on everything being  
14 accurate. That includes the numbers in the financial  
15 statements?

16 A. I would say that's mostly the numbers.

17 Q. And looking at paragraph five, it says, "The registrant's  
18 other certifying officers and I have disclosed, based on our  
19 most recent evaluation of internal control over financial  
20 reporting, to the registrant's auditors and audit committee of  
21 the registrant's board of directors (or persons performing the  
22 equivalent functions):"

23 I'm looking at "(b) any fraud, whether or not  
24 material, that involves management or other employees who have  
25 a significant role in the registrant's internal control over



HBH9TUZ2

Ingrassia - direct

1 financial reporting."

2 Do you see that?

3 A. Yes.

4 Q. Was this representation about there being no -- about fraud  
5 important to you?

6 A. Yes. Obviously. You take this for granted actually.

7 Q. And it also says that fraud, whether material or  
8 immaterial. It doesn't matter how big the fraud is, right?

9 A. Right.

10 Q. And let's just flip to the last page of the  
11 certification -- excuse me. The last page of the 10-K. We're  
12 looking at Exhibit 32.1.

13 In substance what is this page?

14 A. This is the final sign-off on the Sarbanes-Oxley compliance  
15 signed by Mr. Tuzman.

16 Q. And what is Mr. Tuzman representing in this page?

17 A. That the, as it says in point two, that it fairly  
18 represents in all material respects the condition and  
19 operations of the company.

20 Q. And before that?

21 A. That it complies with section 13(a) and 15(d) of the SEC  
22 Act of 1934.

23 Q. What are Section 13(a) and 15(d) of the Securities Exchange  
24 Act? Are those the federal securities laws? Part of the  
25 federal securities laws?

HBH9TUZ2

Ingrassia - direct

1 A. Yes.

2 Q. Was this certification important to you?

3 A. Yes.

4 Q. Why?

5 A. It tells me that I can rely on everything that I just read.

6 Q. Mr. Ingrassia, are you familiar with the -- something  
7 called quarterly guidance?

8 A. Yes.

9 Q. Can you explain to the jury what quarterly guidance is?

10 A. So guidance in general is management's communication to  
11 Wall Street analysts like myself on what they think they can  
12 do, what they estimate their financial performance will be. In  
13 a quarterly case it would be for the quarters to come. And  
14 most companies would give annual guidance as well.

15 Q. Just as an example, let's assume it's the middle of the  
16 first quarter of this year. The company is doing what with  
17 respect to the first quarter?

18 A. (No response).

19 Q. Just explain when in time it comes out.

20 A. So typically a company will give guidance when it reports  
21 the prior -- the prior quarter's results. So if they were  
22 reporting the first quarter, a company that's giving guidance  
23 might give second quarter guidance and then guidance for the  
24 entire year.

25 Q. So it's basically an opinion of how they might do in the

HBH9TUZ2

Ingrassia - direct

1 future?

2 A. Right. And analysts generally assume that that's based on  
3 some fairly rigorous controls in the company that allows them  
4 to estimate sales accurately.

5 Q. Now, throughout your testimony you've referenced the model.  
6 Just in very broad strokes what do you mean by a model?

7 A. So that's an Excel spreadsheet of my creation where I enter  
8 the actual results from a number of prior years and then use  
9 the pattern established by those prior years and what I've  
10 gathered by my own independent research to make my own  
11 projections independent of the guidance of the company for what  
12 they might do in the coming periods.

13 Q. And you said that you gather information from -- is certain  
14 of that information drawn from a company's SEC filings?

15 A. Yeah. I mean it's mostly that. It's difficult to get  
16 anything really out of -- I mentioned that I would call their  
17 customers and their suppliers and competitors but it's -- those  
18 folks don't usually give you actual numbers. You just have to  
19 go with anecdotal evidence.

20 Q. Did you build a model in connection with your research of  
21 KIT digital?

22 A. Yes.

23 Q. Were any particular inputs from KIT digital's financial  
24 statements used in your modeling?

25 A. I mean all of them really.

HBH9TUZ2

Ingrassia - direct

1 Q. Was revenue included?

2 A. Yes, of course.

3 Q. Now in front of you there's a folder. Do you see that?

4 And do you see Government Exhibits 3304A, 3301A and 3301B for  
5 identification? Do you see those three documents?

6 A. Yes. I have them now.

7 Q. Do you recognize those three exhibits?

8 A. These are three of my research reports on KIT digital.

9 MR. NAFTALIS: Your Honor, we offer these not for the  
10 truth. We offer them as opinions and for the witness's state  
11 of mind.

12 MR. WEITZMAN: No objection.

13 MR. JACKSON: No objection, your Honor.

14 THE COURT: Ladies and gentlemen, these three  
15 exhibits, 3304A, 3301A and 3301B are, as Mr. Naftalis said, not  
16 offered for the truth of any of the statements that are  
17 contained in the documents but rather as reflecting the  
18 witness's opinion at the time of, in this case, KIT digital  
19 stock and to the extent it sheds light on his state of mind at  
20 the time that he wrote these reports. So these three exhibits,  
21 3301A, 3304A, and 3301B are received.

22 (Government's Exhibits 3301A, 3304A, and 3301B  
23 received in evidence)

24 MR. NAFTALIS: Permission to publish 3304, your Honor.

25 THE COURT: Yes.

HBH9TUZ2

Ingrassia - direct

1 Q. Just generally what are we looking at here?

2 A. So this is the front page of my research report. It has a  
3 lot of information on it. 52 week high and low, for example.  
4 My price target. And then a summary of the research opinion  
5 that I give inside the note.

6 Q. Okay. We'll walk through it in a second. So this is one  
7 of your research reports from KIT digital at the time?

8 A. Yes. It looks like my report after they reported first  
9 quarter results in 2010.

10 Q. Just stepping back from this exhibit for a second.  
11 Approximately, between 2009 and 2013, how many research reports  
12 about KIT did you publish, just approximately?

13 A. Wow. Well, let's see. It would be at least one per  
14 quarter. There was a fair number of acquisitions and I covered  
15 it for -- I mean it had to be maybe around 30, maybe more.

16 Q. And in each of those did you rely on KIT digital's SEC  
17 filings in preparing those reports?

18 A. Probably not all of them but most of them.

19 Q. And you relied on those SEC filings being accurate?

20 A. Yes.

21 Q. Now let's look specifically at this report just to orient  
22 the jury. On the top there is your name, Richard Ingrassia; is  
23 that right?

24 A. That's right.

25 Q. The date of this one is May 18, 2010?

HBH9TUZ2

Ingrassia - direct

1 A. Yes.

2 Q. That's the date that you published it?

3 A. Correct.

4 Q. And then we see it says KIT digital. That's the company,  
5 obviously?

6 A. Yes.

7 Q. In this case it says KITD 12.75 NASDAQ buy. Can you just  
8 explain what that means?

9 A. So 12.75 was the closing price of the stock the day before  
10 the note was published and then buy is my recommendation on the  
11 stock.

12 Q. Here, below that, you say estimates changed, target price  
13 changed. What does that mean?

14 A. That means that as a result of what I read in the filings  
15 and any subsequent research that I did I changed my estimates  
16 in one way or another and changed my target price. I don't  
17 know whether it was lowering or raising those numbers just  
18 offhand.

19 Q. If we just look at the fourth bullet on the first page.  
20 This may refresh you. What do you write in the fourth bullet?

21 A. Okay. I raised the estimates and I raised the target price  
22 to \$20, just slightly from \$19.50 before that.

23 Q. The stock was trading at 12.75 and you were saying that you  
24 had a target price that it could go up to 20?

25 A. Right. \$20 was my opinion of what I thought the fair value

HBH9TUZ2

Ingrassia - direct

1 of the stock was at the time.

2 Q. And that was based in part on KIT digital's SEC filings?

3 A. Yes.

4 Q. Let's look on the left there are two big blue boxes. One  
5 of them says EPS dollar sign and one of them says revenue,  
6 dollars in millions.

7 What are in each of these boxes?

8 A. So EPS would be at the very bottom of the income statement.  
9 That's the total earnings per share for the company.

10 And then revenue is, as I described before, it's the  
11 total sales of the company in those periods.

12 Q. And then looking at the -- in the revenue section, certain  
13 of the numbers have As after them and certain of the numbers  
14 have Es. Can you explain to the jury what the difference is  
15 and how to read this?

16 A. So the As would be actual results as published in their SEC  
17 filings. And then the Es are my estimates from my model.

18 Q. So is this was May of 2010, which is in the second quarter;  
19 is that right?

20 A. That is in the second quarter. But this is the first  
21 quarter earnings report.

22 Q. So if we look where it says 21.9E, that's an estimate for  
23 how you think what?

24 A. 21.9 was what I estimated for revenues in the second  
25 quarter which we were about halfway through.

HBH9TUZ2

Ingrassia - direct

1 Q. And that's in millions?

2 A. Yes.

3 Q. Are the estimates sometimes called analyst estimates?

4 A. Yes.

5 Q. Let's jump to page five of this exhibit.

6 What are we looking at here?

7 A. That's my model.

8 Q. So we're definitely not going to go through it all.

9 A. Good.

10 Q. But what's the top line of the model?

11 A. The very top line are the -- okay, revenue.

12 Q. Now, you said that -- that your analyst reports were  
13 published?

14 A. Correct.

15 Q. And how were they published?

16 A. So we used a system called BlueMatrix that made the reports  
17 available to our investment banking clients, clients of the  
18 firm, and the companies also had access to those numbers.

19 Q. What about your estimates for revenue? How were those  
20 published?

21 A. So they'd be published in the report in this way, as you  
22 were just highlighting there, in the blue boxes. But they'd  
23 also be picked up by Thomson and like other publicly -- other  
24 data services that would post them publicly online. So really  
25 the estimates themselves were available to everyone. It was



HBH9TUZ2

Ingrassia - direct

1 just my written reports that were only available to our  
2 clients.

3 Q. Now as an analyst did you talk to investors?

4 A. Yes.

5 Q. Did you talk to KIT digital investors?

6 A. Yes.

7 Q. Based on your conversations with investors did you  
8 understand that they used your research in making investment  
9 decisions?

10 A. Yes.

11 MR. WEITZMAN: Objection. Hearsay. Offered for the  
12 truth.

13 THE COURT: Overruled.

14 Q. As a research analyst did you talk to corporate executives  
15 of companies you covered?

16 A. Yes.

17 Q. Based on your conversations with corporate executives, did  
18 you understand that executives read your research?

19 A. Not all of them but some were more interesting than others,  
20 I guess.

21 No. I assumed that they read them. That's the way I  
22 operated.

23 MR. NAFTALIS: We can take this one down, Ms. Pyun.

24 Let's look at Government Exhibit 3301B in evidence.

25 Q. What's the date on this one?

HBH9TUZ2

Ingrassia - direct

1 A. April 2, 2012.

2 MR. NAFTALIS: Let's look at the second page, please.  
3 Zoom in on where it says cash investment.

4 Q. Now when we were looking at KIT digital's 10-K you said  
5 that you paid attention to the cash on the balance sheet; is  
6 that right?

7 A. Yes.

8 Q. And cash was important to you?

9 A. Yes.

10 Q. Can you read what you wrote here after "cash investment  
11 writedown"?

12 A. "The company may not be able to retrieve a 2.1 million cash  
13 investment in an EMEA entity of undisclosed name and therefore  
14 the asset was removed from the books."

15 Q. Was the fact that KIT had disclosed it might not have been  
16 able to retrieve \$2.1 million in cash important to you?

17 A. Yes.

18 Q. Why?

19 A. I mean \$2.1 million is a lot of money still and it was -- I  
20 had never seen a cash writedown in any of the companies before,  
21 in the companies that I had covered.

22 Q. When you say "writedown," what do you mean?

23 A. It means it's taken off the asset. So, we were talking  
24 about that first line in the balance sheet, where it says cash  
25 and cash equivalents, writedown means for whatever reason that

HBH9TUZ2

Ingrassia - direct

1 money was no longer there or they were looking to retrieve it  
2 and weren't able to do that.

3 MR. NAFTALIS: Let's look at Government Exhibit 3301A  
4 in evidence.

5 Q. What's the date on this one, Mr. Ingrassia?

6 A. January 12, 2012.

7 Q. Just looking at the headline on the first page of this one,  
8 see it says "Adding Sezmi to Estimates"?

9 A. Yes.

10 Q. Let's look at the second page of this exhibit. You see  
11 where it says, "Sezmi Acquisition," see it references that?

12 A. Yes.

13 Q. You write, "As a reminder on Friday, January 6 KIT  
14 announced the acquisition of a Silicon Valley based Sezmi for 8  
15 million cash, 8 million in debt assumption, and approximately  
16 11 million stock." And then you go on.

17 What was your understanding of the total consideration  
18 that KIT paid for Sezmi?

19 A. So I would look at this as a total acquisition valued at  
20 \$27 million.

21 Q. And what was your understanding of who was receiving the  
22 \$27 million?

23 MR. WEITZMAN: Objection. Foundation.

24 THE COURT: Sustained.

25 Q. Did you review KIT digital's 8-K -- 8-Ks when it announced

HBH9TUZ2

Ingrassia - direct

1 acquisitions?

2 A. If this was in an 8-K I'm sure I did.

3 Q. It says here, "On Friday January 6 KIT announced the  
4 acquisition," do you see that?

5 A. Yes.

6 Q. Do you recall the source of this information?

7 A. I don't recall specifically but if I said "KIT announced"  
8 that was most likely in a press release.

9 Q. What was your understanding of the total -- of who was  
10 receiving the \$27 million?

11 MR. WEITZMAN: Objection. Foundation.

12 MR. NAFTALIS: We'll do it the long way, your Honor.

13 THE COURT: Okay.

14 MR. NAFTALIS: Can we go back to Government Exhibit  
15 218 in evidence. Go to page 15.

16 Q. This is the 10-K issued to all shareholders, right?

17 A. Yes.

18 Q. Where KIT digital says what it did, right?

19 A. Yes.

20 Q. And this was signed by Mr. Isaza Tuzman, correct?

21 A. Yes.

22 Q. And he certified that everything in here was true?

23 A. Yes.

24 Q. He certified there was no fraud?

25 A. Yes.

HBH9TUZ2

Ingrassia - direct

1 Q. He certified he had reviewed all the pages in it?

2 A. Yes.

3 Q. And Mr. Isaza Tuzman, he certified with respect to Sezmi  
4 here, total consideration was 7.85 million in cash, the  
5 assumption of 16.526 million in liabilities, 2.625 million owed  
6 to the shareholders of Sezmi which will be issued in shares and  
7 held in escrow for a period of up to 12 months following the  
8 closing date and contingent consideration based upon revenue  
9 and other targets totaling 25 million."

10 Do you see that?

11 A. Yes.

12 Q. And we could go back to the 8-K if we wanted to, right?

13 A. Yes.

14 Q. Based -- how long -- were you a research analyst for?

15 A. I was at Roth a little more -- eleven-and-a-half years.

16 Q. Based on your experience and your review of this, what was  
17 your understanding of who the \$27 million in consideration was  
18 going to?

19 MR. WEITZMAN: Objection. Can we have a sidebar, your  
20 Honor.

21 THE COURT: Yes.

22 (Continued on next page)

HBH9TUZ2

Ingrassia - direct

1 (At the sidebar)

2 MR. WEITZMAN: Your Honor this raises the issue that  
3 Mr. McRae raised in Mr. Smyth's direct. All he knows is what  
4 the document says. He can't identify -- he's not a legal  
5 expert. He didn't review the contracts. He can't discuss what  
6 his interpretation is of what the consideration meant. Just  
7 say what the document says and that's it. It's for them to  
8 argue that that meant something else, but he's not the legal  
9 expert.

10 MR. NAFTALIS: I'm asking for what a professional  
11 understands an SEC filing to say.

12 THE COURT: And the point is that it's a fair  
13 inference that \$27 million was paid to the owners of Sezmi,  
14 right?

15 MR. NAFTALIS: You can cross him on this and I expect  
16 you will, but it's --

17 MR. WEITZMAN: Your Honor, the second thing.

18 THE COURT: I'm sorry?

19 MR. WEITZMAN: The second thing unrelated to this  
20 question in particular I think government counsel should not be  
21 injecting invective such as I'll do it the long way which  
22 suggests to the jury that my objections are improper even if  
23 sustained.

24 THE COURT: Try not to do that.

25 MR. NAFTALIS: I will.

HBH9TUZ2

Ingrassia - direct

1 (In open court)

2 MR. NAFTALIS: We can bring that back up, please.

3 Q. So I'll ask again. You said it was 27 million  
4 approximately in total consideration?

5 A. Yes.

6 Q. You're basically adding 7.8 plus 16 plus -- 16.5 plus 2.6  
7 to get to that number?

8 A. Correct.

9 Q. And in your report you were rounding the numbers. Is that  
10 accurate?

11 A. Yes. It said 27 in the report. I can't off the top of my  
12 head understand or explain the -- this says 25 million in this  
13 paragraph.

14 Q. Okay. Either way, what was your understanding of who was  
15 receiving the 25 million or the 27 million in consideration?

16 A. Well, I would assume the cash, and here it says 7,850,000,  
17 I would assume that cash would go to Sezmi shareholders. The  
18 debt would be assumed. So not necessarily any cash exchange  
19 there. And then 2.625 million in stock held in escrow also for  
20 Sezmi shareholders.

21 Q. Focusing on the cash. When you see the 7.85 million in  
22 cash, your understanding is that consideration goes to who?

23 A. Sezmi shareholders.

24 Q. Do you see any disclosure in here that that cash is going  
25 to anybody else?

HBH9TUZ2

Ingrassia - direct

1 A. Not here, no.

2 Q. Was it important to you that this disclosure be accurate?

3 A. Yes.

4 Q. Was it important to you that the company disclose to you  
5 who was getting the cash?

6 A. Yes.

7 Q. Why?

8 A. I would just assume -- I mean that's -- if it was going  
9 somewhere else then -- I don't -- I wouldn't know what to do or  
10 how to analyze it.

11 Q. Now, you said you reviewed KIT digital's financial  
12 statements for 2009 to '13?

13 A. Yes.

14 Q. Would you say you're familiar with them?

15 A. Yes.

16 Q. In your review of their financial statements, did you ever  
17 see any disclosure that money that was earmarked for  
18 integration or restructuring was being used to pay down  
19 outstanding accounts receivable?

20 A. I don't recall anything like that.

21 Q. Would that have been important to you?

22 A. Yes.

23 Q. Why?

24 A. Because money spent on integration was money being spent on  
25 the operations of the business, important operations of the



HBH9TUZ2

Ingrassia - direct

1 business, especially here, where companies were being acquired  
2 and integrated into the existing company.

3 Q. In your review of KIT's SEC filings did you see any  
4 disclosure about side letters with respect to transactions and  
5 where consideration was going to go?

6 A. I can't recall anything like that.

7 Q. Would that have been important to you?

8 MR. WEITZMAN: Objection. Cuti.

9 THE COURT: I'm sorry?

10 MR. WEITZMAN: Cuti. Objection.

11 MR. NAFTALIS: Why was that important to you.

12 THE COURT: You can modify the question.

13 THE WITNESS: Can you ask the question again.

14 Q. You didn't see any disclosure of that?

15 A. Not that I remember, no.

16 Q. Why was that important to you?

17 MR. WEITZMAN: Objection.

18 MR. NAFTALIS: I'll move on. It's fine.

19 Now can we bring up Government Exhibit 2970 in  
20 evidence, please.

21 Q. Do you see this document, Mr. Ingrassia?

22 A. Yes.

23 Q. What was the first time you saw it?

24 A. In your office the other day.

25 Q. Roughly when was that?

HBH9TUZ2

Ingrassia - direct

1 A. Wednesday.

2 Q. And you said you reviewed KIT digital's SEC filings between  
3 2009 and '13?

4 A. Yes.

5 Q. Did you ever see any disclosure of a December 31, 2008  
6 agreement between Omar Amanat, Stephen Maiden and Kaleil Isaza  
7 Tuzman?

8 A. No. I don't remember anything like that.

9 Q. And how long have you worked in finance?

10 A. Since 1997.

11 Q. In your career have you ever heard of a CEO of a public  
12 company paying a shareholder to buy its stock?

13 MR. WEITZMAN: Objection, foundation.

14 THE COURT: Overruled.

15 THE WITNESS: I can't recall any -- seeing anything  
16 like this before.

17 Q. And you -- with respect to KIT digital did you speak to any  
18 of their corporate officers at the time you were covering the  
19 company?

20 A. Yes.

21 Q. Do you remember who?

22 A. Well it would be Mr. Tuzman mostly; the CFO, Robin Smyth;  
23 and on occasion Gavin Champion.

24 Q. Did any of them ever mention something called the elephant  
25 to you?

HBH9TUZ2

Ingrassia - cross

1 A. No.

2 MR. WEITZMAN: Objection.

3 THE COURT: Grounds.

4 MR. WEITZMAN: Vague.

5 THE COURT: Overruled.

6 MR. NAFTALIS: No further questions, your Honor.

7 THE COURT: All right.

8 Cross-examination.

9 MR. WEITZMAN: Yes, your Honor. We have some binders  
10 for the Court.

11 THE COURT: Thank you.

12 CROSS-EXAMINATION

13 BY MR. WEITZMAN:

14 Q. Good morning, Mr. Ingrassia.

15 A. Good morning.

16 MR. WEITZMAN: I'm sorry. I forgot something.

17 Q. Mr. Ingrassia, you have extensive experience analyzing  
18 media and entertainment companies, correct, technology  
19 companies?

20 A. Yes.

21 Q. Over 20 years experience, correct?

22 A. Yes.

23 Q. You have a bachelor's degree in economics and statistics,  
24 right?

25 A. Yes.

HBH9TUZ2

Ingrassia - cross

1 Q. You were a research analyst starting in the mid 1990s,  
2 right?

3 A. I wasn't an actual equity research analyst in the '90s. I  
4 was more of an industry research analyst at the time.

5 Q. As an industry research analyst you gained exposure to  
6 analysis of financial statements, correct?

7 A. Correct.

8 Q. And analysis of the health and well-being of companies?

9 A. Yes.

10 Q. So over -- since the mid 1990s this is basically what  
11 you've been doing, analyzing companies, their balance sheets,  
12 their financial statements and the like, right?

13 A. Yes.

14 Q. And for that period of time you've spoken probably to  
15 dozens, hundreds of CEOs and CFOs; is that right?

16 A. Maybe not hundreds but a lot.

17 Q. A lot.

18 In fact, you're sought after as a commentator about  
19 companies, correct?

20 A. I suppose you could say that.

21 Q. You've published hundreds of research notes and  
22 newsletters?

23 A. It's probably in the hundreds, yes.

24 Q. You've appeared on TV, correct?

25 A. It's been a while, but yes.

HBH9TUZ2

Ingrassia - cross

1 Q. CNBC, Bloomberg, right?

2 A. Yes.

3 Q. You've been quoted in leading newspapers, correct?

4 A. Yes.

5 Q. The Wall Street Journal, Investors Business Daily, USA

6 Today, Forbes. Do you recall being quoted in each of those?

7 A. Yes. I'm not sure specifically what about.

8 Q. And one of the reasons you're quoted and sought after for

9 TV every now and then is because you're considered an expert in

10 your field, research analysis, right?

11 MR. NAFTALIS: Objection, your Honor. To the extent  
12 that we're opening some --

13 MR. WEITZMAN: No, we're not, your Honor.

14 THE COURT: Then I'll allow you to answer that  
15 question.

16 THE WITNESS: Yes.

17 Q. You are what we call a professional analyst, right?

18 A. Yes.

19 Q. And so as a professional analyst you have to read

20 everything about the company, right, that you're covering?

21 A. I try to.

22 Q. And you talk to management?

23 A. Yes.

24 Q. Up and down the chain, right, if you can?

25 A. Yes, if I can.

HBH9TUZ2

Ingrassia - cross

1 Q. And your job is to make predictions about where companies  
2 are going to go, right?

3 Among other things?

4 A. Among other things, yes.

5 Q. And then you rate them as a buy or a sell, right?

6 A. Or a hold.

7 Q. Or a hold. Thank you.

8 And is it fair to say that given your depth of  
9 experience and expertise you're not the average investor or  
10 analyst, correct?

11 MR. NAFTALIS: Objection. Form. Vague.

12 THE COURT: Sustained.

13 Q. Sir, as a function of your expertise you really drill down  
14 into companies' numbers, correct?

15 A. Yes.

16 Q. And so there are details of financial statements that are  
17 important to you, correct?

18 Even minor details might be important to you, correct?

19 A. Yes.

20 Q. And fair to say that you're looking at companies much more  
21 intensively than the average investor?

22 MR. NAFTALIS: Objection.

23 THE COURT: Sustained.

24 Q. So we talked about some of your equity research notes.

25 Would it surprise you to learn that you wrote 42 of them about

HBH9TUZ2

Ingrassia - cross

1 KIT digital?

2 A. No.

3 Q. I'd like to put up KIT Exhibit 3512.

4 Do you recognize this document?

5 A. This looks like my initiation report, the first note I  
6 wrote, first research report on the company.

7 MR. WEITZMAN: We offer KIT Exhibit 3512.

8 MR. NAFTALIS: Your Honor, no objection to the extent  
9 it's offered not for the truth and it's his opinion.

10 MR. JACKSON: No objection, your Honor.

11 THE COURT: All right. Ladies and gentlemen, as was  
12 true with the other research reports this report is also being  
13 received not for its truth but rather for the state of mind of  
14 the witness.

15 All right 3512 is received.

16 (Defendant Exhibit KIT 3512 received in evidence)

17 MR. WEITZMAN: If we may publish that.

18 THE COURT: Yes.

19 Q. This is what you called your initiation equity research  
20 report, correct?

21 A. Correct.

22 Q. You initiated coverage on November 24, 2009?

23 A. Yes.

24 Q. And in initiating coverage you had to really study the  
25 company, correct?

HBH9TUZ2

Ingrassia - cross

1 A. Yes.

2 Q. And study the market, right?

3 A. I'm not sure what you mean by "the market."

4 Q. Let's change it. Study the industry in which the company  
5 is competing, right?

6 A. Yes.

7 Q. And you rated in your very first equity research report  
8 that KIT digital was a buy, correct?

9 A. Yes.

10 Q. That's because that's what you genuinely believed, that KIT  
11 digital was going places, right?

12 A. Well, it's a little more -- it's not a science, but it's a  
13 little more scientific than that. My twelve-month price  
14 target, as I estimated, was 16, \$16 a share, and the stock was  
15 currently at \$10.80 a share. So that by our definitions at  
16 Roth was a buy.

17 Q. I'm just trying to make it more colloquial. What you're  
18 suggesting is that the stock price was -- you thought it could  
19 increase, should increase?

20 A. Yeah. I would hesitate to say "should," but I would just  
21 say that I thought it was worth more than where it was  
22 currently trading.

23 Q. And one of the reasons you thought it was worth more than  
24 where it was currently trading is based on your financial model  
25 of the company, right?



HBH9TUZ2

Ingrassia - cross

1 A. Correct.

2 Q. Now, that financial model includes certain assumptions,  
3 right?

4 A. Yes.

5 Q. It's not just information the company provides, but it's  
6 assumptions you're making within your financial model, right?

7 A. With -- yes. But it's based on -- I used the historical  
8 results as a basis for a lot of what I assumed going forward.

9 Q. Right. Fair enough. And one of the assumptions you're  
10 making is as to the growth in, for instance, the demand for  
11 video IP, right?

12 A. Right. That would be just a sector, a trend that supports  
13 the growth of any company.

14 Q. That's not information you're relying on from KIT digital  
15 but just market information, right?

16 A. Yes and no. Both. I would say.

17 Q. And one of the other things that plays into your  
18 assumptions is what's called the multiple at which other  
19 companies are trading at, right?

20 A. Not really, no. In my analysis I focused primarily on the  
21 net present value of the cash flows as the basis for my  
22 valuation, not what other companies were trading for  
23 necessarily.

24 Q. Okay. But are you ascribing a multiple to KIT digital, KIT  
25 digital's revenues?

HBH9TUZ2

Ingrassia - cross

1 A. No.

2 Q. One of the other things you're doing in building out your  
3 financial model is you're relying on comps, right?

4 A. Again, I looked at companies -- all the companies that I  
5 covered, not necessarily in comparison to other valuations in  
6 this space, but just purely on the valuation of their  
7 discounted cash flows as I estimated them.

8 Q. You recall that in some of your equity research reports  
9 you're discussing comparable companies?

10 A. Yes.

11 Q. And one of the reasons you're discussing comparable  
12 companies is because you're trying to determine for yourself  
13 and for your clients the extent to which KIT digital is trading  
14 in similar fashion to comparables or not, right?

15 A. Well for me it was really more just of a gut check on my  
16 price target.

17 Q. Okay. And one of the other things you're doing is you're  
18 doing what's called channel checks, right?

19 A. Yes.

20 Q. And a channel check is when you call up KIT digital's  
21 customers and actually talk to them about what their views are  
22 of KIT digital's products and services, right?

23 A. Yeah, their views of the product would be probably part of  
24 the discussion.

25 Q. And those channel checks were important in your analysis of

HBH9TUZ2

Ingrassia - cross

1 the company, right?

2 A. Yes and no. They were important anecdotally for me to  
3 understand: A, that they actually were customers first; and B,  
4 that they were happy customers. But, as I said before, those  
5 customers are mostly private companies or, in any case, would  
6 not share numbers with me specifically.

7 Q. Right.

8 A. In most cases.

9 Q. But if the channel checks had come out negative, that would  
10 influence your views of the company, right?

11 MR. NAFTALIS: Objection, your Honor.

12 THE COURT: Grounds.

13 MR. NAFTALIS: I think this is sort of the -- the time  
14 period and the reverse Cuti issue again.

15 THE COURT: All right. I'll see the lawyers at  
16 sidebar.

17 (Continued on next page)

HBH9TUZ2

Ingrassia - cross

1 (At the sidebar)

2 THE COURT: Where are we going exactly?

3 MR. WEITZMAN: I'm just trying to lay the foundation  
4 that he's relying on a lot of different factors to come up with  
5 his rating system and his recommendations, and one of them is  
6 channel checks. He's saying not so much, but I'm trying to  
7 establish that he actually listened to the channel checks. If  
8 they would have come out negative, he would have incorporated  
9 that into his analysis. That's it.

10 THE COURT: Do you have a problem with that?

11 MR. WILLIAMS: Apparently the channel checks are meant  
12 to determine whether the customers are, in fact, customers.  
13 And it seems like you were trying to establish that he did  
14 channel checks and no one -- none of them came up negative and  
15 that if it had come up negative it would have impacted his  
16 recommendation, right, which is the objection to reverse Cuti.

17 MR. WEITZMAN: I'm not sure it is. I'm not asking him  
18 for a hypothetical to establish materiality of anything. I'm  
19 just asking him the importance of channel checks in his  
20 analysis.

21 MR. WILLIAMS: Are you planning on asking him whether  
22 or not any of the channel checks came up negative?

23 MR. WEITZMAN: That's a fact he can decide.

24 MR. NAFTALIS: -- if this had happened would that have  
25 been important, which I steered clear of.

HBH9TUZ2

Ingrassia - cross

1 I don't think this is going to be controversial. I'm  
2 just trying to point out that you restricted my direct  
3 examination. Now you're trying to pose hypotheticals to a  
4 witness because you like them. I don't care. I think all this  
5 is fair game. But I don't think you can have it both ways. I  
6 don't think there's anything terribly controversial that KIT  
7 digital is a real company. So, you know, if he wants to spend  
8 time on this it's fine. But I just don't think the questions  
9 are relevant or appropriate given what we were not allowed to  
10 do.

11 MR. WEITZMAN: There is totally different purpose for  
12 the question. All I'm trying to establish -- I can take out  
13 the word "if" if that helps the government counsel.

14 THE COURT: I think the reason why we're where we're  
15 at is that the witness didn't give you the answer that you  
16 wanted on whether channel checks were important. He gave you  
17 an answer. It wasn't the one you wanted, and so now you're  
18 probing him on it.

19 MR. WEITZMAN: Exactly.

20 THE COURT: I don't think it's a hypothetical yet. So  
21 I am going to overrule the objection.

22 MR. WILLIAMS: There was one other objection.  
23 Mr. Weitzman has not put a time period to any of his prior ten  
24 or so questions. And so now that we're getting into this area  
25 of channel checks he should be specific about the time period

HBH9TUZ2

Ingrassia - cross

1 he's referring to.

2 THE COURT: Yes.

3 MR. JACKSON: I'm fine for the moment. I just -- I  
4 had too much coffee. I'm just wondering approximately what  
5 time does the Court expect to --

6 THE COURT: I was going do break at 11:30 which is in  
7 just a few minutes.

8 (Continued on next page)

HBH9TUZ2

Ingrassia - cross

1 (In open court)

2 MR. WEITZMAN: Sorry. Is there an objection pending,  
3 your Honor?

4 THE COURT: No.

5 Q. We were talking about channel checks, Mr. Ingrassia?

6 A. I wasn't. You were asking me about them.

7 Q. Exactly. And as part of your research into a company you  
8 call a company's clients to determine how things are going with  
9 the products and services they're receiving, right?

10 A. I would try to but I wasn't always --

11 THE COURT: Please don't cut the witness off.

12 Go ahead, sir.

13 A. I wasn't always successful getting through.

14 MR. WEITZMAN: Can we put up KIT Exhibit 3514.

15 Q. Do you recognize this, sir?

16 A. Yes. That's my report from March 15, 2010.

17 MR. WEITZMAN: We offer KIT Exhibit 3514.

18 MR. NAFTALIS: No objection subject to the same  
19 limitations.

20 MR. JACKSON: No objection, your Honor.

21 THE COURT: So, ladies and gentlemen, it seems like  
22 we're going to see a number of research reports. The same  
23 instruction as to all of them. None of them are being offered  
24 for the truth of the statements in the reports. Rather, they  
25 are all being offered to the extent they shed light on the

HBH9TUZ2

Ingrassia - cross

1 witness's state of mind.

2 3514 is received.

3 (Defendant Exhibit KIT 3514 received in evidence)

4 MR. WEITZMAN: If we may publish that.

5 Q. You issued an equity research report on March 15, 2010  
6 correct?

7 A. Yes.

8 Q. And the title of the report was, "Channel Checks Reveal  
9 Strong Client Macros Upside to 2010 Growth; Reiterate Buy."

10 Do you see that?

11 A. Yes.

12 Q. You're talking about KIT digital at this point?

13 A. Yes.

14 MR. WEITZMAN: If we can turn to page two.

15 And if you can highlight the paragraph that says "Our  
16 confidence."

17 Q. What you said is, "Our confidence in KIT digital is founded  
18 not only on the historical pattern, however, but on the results  
19 of several very positive channel checks with key clients  
20 acquired by KIT digital in the FeedRoom and Nunet transactions  
21 of October 2009. These clients are among the fortune global  
22 200 and asked to remain anonymous, but we offer the following  
23 general observations:"

24 Then you have, if you can expand that, I won't read  
25 all the observations, just the titles of them.



HBH9TUZ2

Ingrassia - cross

1 "Potential to Consolidate Third Parties with VX-One  
2 package, international expansion, high switching costs, and  
3 usage-based contracts," right?

4 A. Yes. Can I read the paragraph before the "our confidence"  
5 paragraph.

6 MR. WEITZMAN: Of course. If we can go up.

7 THE WITNESS: Okay.

8 Q. So I just want to establish these channel checks were  
9 important at times, for example, in connection with this  
10 March 15, 2010 report to your recommendations and conclusions,  
11 right?

12 A. Yes. I mean the reason why I wanted to read the paragraph  
13 before was because I'm not sure if I'm talking -- I can't  
14 recall if I was talking about the historical pattern of actual  
15 results or the historical pattern of those clients that I  
16 checked.

17 Q. Okay. In any event, my question is a different one. My  
18 question is those channel checks were relevant to your  
19 analysis, right?

20 A. They were supplemental, yeah. They were relevant, yes.

21 MR. WEITZMAN: Your Honor, this would be a good time  
22 for a break.

23 THE COURT: Ladies and gentlemen, we'll take our mid  
24 morning recess. Don't discuss the case. Keep an open mind.  
25 There's more evidence. We'll be back to you shortly.

HBH9TUZ2

Ingrassia - cross

1 (Jury not present)

2 THE COURT: You can step down, sir.

3 (Witness excused)

4 THE COURT: Please be seated. Anything we need to  
5 discuss?

6 MR. NAFTALIS: No, your Honor.

7 (Recess)

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HBHQTUZ3

1 (Jury not present)

2 THE COURT: Are we prepared to proceed?

3 MR. WILLIAMS: Yes, your Honor.

4 THE COURT: The witness should take the stand.

5 Mr. Weitzman, have you provided me whatever certain  
6 materials were provided to the government concerning Mr. Lyter.

7 MR. WEITZMAN: Your Honor, we either have it here -- I  
8 have to check with my paralegals -- or we will have it by the  
9 end of the day. There have been additional materials provided  
10 even as late as last night, and I'm happy to reference those,  
11 but we do intend to provide it to your Honor.

12 THE COURT: Today.

13 MR. WEITZMAN: Yes.

14 THE COURT: OK. Please bring in the jury.

15 (Continued on next page)

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HBHQTUZ3

Ingrassia - Cross

1 (Jury present)

2 CROSS-EXAMINATION

3 BY MR. WEITZMAN:

4 THE COURT: Please proceed with questioning.

5 MR. WEITZMAN: Yes. Thank you, your Honor.

6 Q. Mr. Ingrassia, the ROTH research reports that you  
7 published, they were available to ROTH clients, correct?

8 A. Yes.

9 Q. And is that investment banking clients?

10 A. Not necessarily clients of investment banking but any of  
11 our clients.

12 Q. Are most of your clients companies?

13 A. I don't understand. They're mutual funds and hedge funds,  
14 clients of ROTH.

15 Q. So most of your clients are companies, large companies or  
16 medium-size companies in the financial sector, right?

17 A. Yes.

18 Q. You'd call most of your clients sophisticated market  
19 participants?

20 A. I don't know if I'd say most of them, but many of them are.

21 Q. I take it individual investors weren't your clients; the  
22 mutual funds and hedge funds that had or invested their money  
23 were your clients, right?

24 MR. NAFTALIS: Objection to form.

25 THE COURT: Sustained. It's compound.

HBHQITUZ3

Ingrassia - Cross

1 Q. Sir, the individual investors who invested with mutual  
2 funds and hedge funds, they weren't your clients, correct?

3 MR. NAFTALIS: Same objection.

4 THE COURT: Sustained.

5 Q. Sir, as an equity research analyst, you often communicated  
6 with chief financial officers of publicly traded companies,  
7 right?

8 A. Yes.

9 Q. And, in fact, you spoke to many CFOs at many companies,  
10 right?

11 A. Yes.

12 Q. Many of the CFOs at those companies would on occasion reach  
13 out to you, right?

14 A. I don't recall -- well, I suppose --

15 Q. Sometimes CFOs were interested in learning how you reached  
16 the numbers you reached in your forecasts, right?

17 A. They're interested but generally they didn't reach out to  
18 me directly.

19 Q. OK. But you had conversations with CFOs about the  
20 assumptions in your models, right?

21 A. To some extent, yes.

22 Q. You had conversations with CFOs about your analyst  
23 expectations?

24 MR. NAFTALIS: Your Honor, this is very broad. We  
25 object to the form.

HBHQTUZ3

Ingrassia - Cross

1 THE COURT: I'll allow it.

2 A. Can you repeat it again.

3 Q. So, you would issue expectations for companies, like  
4 earnings expectations. Is that what you'd call it?

5 A. I would publish earnings estimates, yes.

6 Q. Earnings estimates, not expectations. Thank you.

7 And as part of those estimates, did you sometimes have  
8 conversations with CFOs of publicly traded companies about how  
9 you reached those estimates?

10 A. Usually not specifically about how I -- what assumptions I  
11 made, no, and certainly not before I published them.

12 Q. I mean after you published them. CFOs ever call you and  
13 say, "Hey, I'm not seeing how you reached that estimate" or  
14 "It's too low" or "It's too high"?

15 A. They really can't do that, but they would ask me for my --  
16 a little more detail occasionally.

17 Q. OK. Would it surprise you if there was a CFO who had no  
18 interest in your research?

19 A. Yes, it would surprise me.

20 Q. Because part of their job is to understand the analyst's  
21 expectations of the company, right?

22 A. That's right.

23 Q. Part of their job is to manage the company's budgeting, for  
24 example, right?

25 A. Not necessarily the CFO. Might have a chief accounting

HBHQTUZ3

Ingrassia - Cross

1 officer, someone below the CFO that would do that.

2 THE COURT: We're getting far afield here.

3 Q. You communicated with Mr. Smyth some, right?

4 A. Yes.

5 Q. You communicated with him regarding assumptions for your  
6 model, correct?

7 MR. NAFTALIS: Objection. The word "assumption" is  
8 very broad, your Honor.

9 THE COURT: Sustained.

10 Q. Sir, when you -- withdrawn.

11 Did you communicate with him regarding financial  
12 performance metrics?

13 MR. NAFTALIS: Your Honor, a time period would be  
14 helpful.

15 THE COURT: Yes, a time period is necessary.

16 Q. In 2010, May 2010, did you communicate with Mr. Smyth  
17 regarding financial assumptions or performance metrics?

18 A. Can you be more specific about the metrics?

19 Q. In May 2010, do you recall asking to speak to Kaleil Isaza  
20 Tuzman or Robin Smyth regarding certain assumptions in your  
21 model?

22 A. I don't recall that date specifically.

23 MR. WEITZMAN: Put up KIT Exhibit 3424 -- 3524, excuse  
24 me. If we can go to page 2 and page 3. If you can  
25 highlight --

HBHQITUZ3

Ingrassia - Cross

1 Q. Mr. Ingrassia, do you see this email? I'm going to ask you  
2 to focus on the bottom part of this email. Does this refresh  
3 your recollection that in May 2010 you asked to speak to either  
4 Kaleil Isaza Tuzman or Robin Smyth regarding assumptions to  
5 revise your model?

6 A. That looks like an email of mine.

7 Q. I'm sorry, I'm asking specifically does this refresh your  
8 recollection of that?

9 A. Not the specific conversation, no.

10 Q. But -- I'm not asking about a conversation again. I  
11 apologize.

12 I'm asking whether this refreshes your recollection  
13 that in May 2010 you asked to speak to Kaleil Isaza Tuzman or  
14 Robin Smyth regarding assumptions for your KIT digital model?

15 A. Yeah, I suppose.

16 Q. In fact, you did speak to Robin Smyth regarding assumptions  
17 and financial performance metrics, correct?

18 A. I honestly don't remember if it was on that date or if that  
19 conversation happened.

20 Q. OK. At any point in 2010, did you speak to Robin Smyth?

21 A. To be perfectly honest, I don't remember a lot of  
22 conversations with Robin Smyth. I may have, but I couldn't  
23 tell you when or how many times.

24 Q. Now, as we established -- as we talked about earlier, you  
25 initiated coverage on KIT digital in November 2009, correct?



HBHQTUZ3

Ingrassia - Cross

1 A. Correct.

2 Q. And you rated KIT digital buy, correct?

3 A. Correct.

4 Q. And you understood at that time what KIT digital's business  
5 was about, right?

6 A. I believe so, yes.

7 Q. You understood that they were selling software and services  
8 to help companies manage and distribute video over IP, over the  
9 internet, right?

10 A. Correct.

11 Q. And part of your thesis was based on the expectation that  
12 the IP video industry was going to grow substantially, correct?

13 THE COURT: I don't -- could you establish what his  
14 thesis was.

15 MR. WEITZMAN: The thesis that it was a buy, sorry?

16 THE COURT: Oh, yes, OK.

17 Q. Part of the thesis supporting your buy rating was that you  
18 expected the IP video industry to grow substantially, correct?

19 A. Well, part of my thesis -- the thesis was on the industry  
20 altogether. The buy rating was specifically related to my --  
21 my projection of value for KIT digital.

22 Q. OK. So --

23 A. There are plenty of companies in the space that I didn't  
24 think that highly of, based on their numbers.

25 Q. Fair enough. In 2009, you thought very highly of KIT

HBHQTUZ3

Ingrassia - Cross

1 digital?

2 A. I thought they were undervalued, yes.

3 Q. And part of your thesis was that there be consolidation in  
4 the industry, right?

5 A. Yes.

6 Q. And you thought that KIT digital's strategy of buying up  
7 companies around the world would establish it as a leader in  
8 the industry, right?

9 A. I mean, I didn't know if they would end up as a leader, but  
10 I did think that by buying similar assets, it would be  
11 important for the company's growth.

12 Q. Right. And you were a proponent of KIT digital's global  
13 reach, right, expansion?

14 A. Generally, yes.

15 Q. It didn't surprise you in any respect that KIT digital  
16 moved its headquarters from New York to Prague, right?

17 A. I don't know if I could say that it surprised me or not.

18 Q. You understood at the time, sir, that Prague was a hub in  
19 this industry and other technology industries, correct, for  
20 corporate headquarters, right?

21 MR. NAFTALIS: Your Honor, could we get a time frame?  
22 I think Mr. Weitzman may have misspoke in terms of --

23 THE COURT: Yes. Yes.

24 MR. WEITZMAN: Fair enough.

25 Q. In 2009, do you recall that Prague was a location where a

HBHQTUZ3

Ingrassia - Cross

1 lot of technology companies were either moving to or  
2 establishing a presence in?

3 A. Yeah, I don't know where I would have ranked it at the  
4 time, but it was becoming known for that.

5 Q. Because they have high education, good technology  
6 professionals --

7 THE COURT: Sustained.

8 Q. You understood, sir, that Prague was a cheaper location  
9 to --

10 THE COURT: Sustained.

11 Q. Sir, as part of your analysis of the industry, did you have  
12 to understand the various benefits of operations in certain  
13 cities as opposed to others?

14 MR. NAFTALIS: Relevance.

15 THE COURT: Yes, sustained.

16 Q. Sir, as part of the -- one of the things that you liked  
17 about KIT digital is the fact that it was focusing on  
18 enterprise clients, correct? We'll define that in a moment.

19 A. That was part of it.

20 Q. And an enterprise client is a large multinational company  
21 that could apply KIT digital's technology across the company in  
22 various ways, right?

23 A. Not necessarily a large multinational, but corporate  
24 clients versus individual clients.

25 Q. OK. And in particular, the larger corporations were the

HBHQTUZ3

Ingrassia - Cross

1 ones that were impressing you as far as KIT digital's client  
2 base, right?

3 A. Yes, I'd say it was important to have some big name  
4 clients.

5 MR. WEITZMAN: Can we put up KIT Exhibit 3512, page 5.  
6 Highlight the top.

7 Q. In your initial coverage report, you highlighted some of  
8 the companies major client works and capabilities, correct?

9 A. Yes.

10 Q. And these were some of the largest clients that KIT digital  
11 had, right?

12 A. That's the way it was communicated to me, yes.

13 Q. You weren't focusing on small clients. You were focusing  
14 in your report on the larger clients?

15 A. Not necessarily. I was interested in any client I could  
16 speak to about the company.

17 Q. At any point in your relationship or coverage of KIT  
18 digital, did Kaleil ever mention to you a company called  
19 Crosshaven?

20 A. Doesn't ring a bell.

21 Q. Did he ever mention to you a company called Wolfgang  
22 Holdings?

23 A. I don't recall that.

24 Q. Did he ever mention to you a company called Bimini Trading?

25 A. No.

HBHQITUZ3

Ingrassia - Cross

1 Q. But you recall that he was talking to you about the large  
2 enterprise clients like these, right?

3 A. I don't know if it was a conversation between Mr. Tuzman  
4 and I, but this -- this obviously came from the company.

5 Q. And you'd agree with me, sir, that you thought that KIT  
6 digital was well positioned in the global marketplace by  
7 focusing on these larger clients, right?

8 THE COURT: Can we have a point in time?

9 Q. In 2009.

10 A. I would say generally yes, but the thing about big clients  
11 is they're really -- they do more to impress shareholders --  
12 big clients like this typically have several vendors like KIT  
13 digital, so I thought it was important that they had these big  
14 name clients, but I -- a lot of companies in this space had  
15 these big name clients.

16 Q. OK. Fair enough.

17 You'd agree with me that as part of your buy rating in  
18 2009, you cared or you believed that KIT digital might be an  
19 acquisition target, right?

20 A. I felt that any company of their size in the space could  
21 possibly be an acquisition target.

22 Q. In fact, in 2009, you believed that Kaleil was a key person  
23 within the company, right?

24 A. Yes, as CEO, sure.

25 Q. And one of the risk factors you identified in your report

HBHQTU23

Ingrassia - Cross

1 was should Kaleil leave as CEO of the company, right?

2 A. That's a pretty typical risk to point out in any company,  
3 yes, of the CEO.

4 Q. In fact, you included that in each of your reports,  
5 correct, until Kaleil left?

6 A. Again, that's a typical disclosure, and it was in every  
7 company that I covered, yeah, key people.

8 Q. I understand that, sir. You included that in each of your  
9 reports. Yes or no.

10 A. I believe so, yes.

11 Q. In February 2010, you called KIT digital a top pick in your  
12 eyes, correct?

13 A. Correct.

14 Q. And in March 2010, do you recall that you re-confirmed your  
15 buy rating for KIT digital?

16 A. I probably did because I had a buy rating on it the whole  
17 time that I covered the stock.

18 Q. Right. And one of the things that I think we saw this  
19 earlier, one of the -- withdrawn.

20 You recall that you analyzed KIT digital's  
21 acquisitions in 2010 and concluded that they would be  
22 accretive?

23 A. Based on information from the company, yes; while I can't  
24 say all of them were accretive, no.

25 Q. But many of them you thought were accretive to the

HBHQTUZ3

Ingrassia - Cross

1 company's growth, right? Yes or no.

2 A. Yes.

3 Q. And in March 2010, you specifically were impressed by the  
4 growing number of enterprise customers that KIT digital had,  
5 right?

6 A. Is that a quote from my report?

7 THE COURT: No, he's just asking you if you recall  
8 that in 2010 you felt that way.

9 THE WITNESS: OK, I did.

10 Q. I'm sorry, I couldn't hear your answer.

11 A. Yes.

12 Q. OK. And, by the way, you spoke briefly about Sezmi, that  
13 acquisition. Do you recall that?

14 A. I don't recall the details of the acquisition really or the  
15 company, but, yes.

16 Q. That wasn't my question. Apologies if it was poorly  
17 worded. You recall testifying on direct about the Sezmi  
18 acquisition?

19 A. Yes.

20 Q. And do you recall that one of the reasons that you  
21 discussed the Sezmi acquisition in your research note was  
22 because you said that the Sezmi acquisition was perhaps more  
23 important to the patent portfolio than the company's profits  
24 and loss. Do you recall that?

25 A. I do, yeah, perhaps.

HBHQTUZ3

Ingrassia - Cross

1 Q. And that's what you believed at the time, right?

2 A. Yes.

3 Q. Now, to be clear, you never reviewed the actual contract  
4 involving the Sezmi sale, right?

5 A. No, that was the sort of thing that analysts don't get  
6 exposure to.

7 Q. And you don't know what the terms of the contract were  
8 other than what was in the 8-K you reviewed, right?

9 A. And in the press release or what was communicated to me by  
10 the company.

11 Q. Right. You didn't know whether the -- withdrawn.

12 You also testified about a December 31, 2008 agreement  
13 that involved Mr. Maiden and Mr. Isaza Tuzman as the managing  
14 director of KIT digital. Do you recall that?

15 A. Yes.

16 Q. And you testified that you had not seen such an agreement  
17 before?

18 A. Correct.

19 Q. You don't hold yourself out as a lawyer reviewing  
20 agreements, buy and hold agreements, right?

21 A. No.

22 Q. And you don't have any knowledge one way or the other  
23 whether the agreement was ever implemented, right?

24 A. No, I don't.

25 Q. You don't have any knowledge one way or another as to



HBHQTUZ3

Ingrassia - Cross

1 whether it was ever an effective agreement, right?

2 A. No.

3 Q. And you don't have any knowledge one way or the other as to  
4 whether Mr. Maiden was planning to purchase the stock  
5 referenced in that agreement in any event, right?

6 A. Right.

7 Q. You do know Mr. Maiden though, right?

8 A. I can't say that I know him personally.

9 Q. OK. You know Mr. Maiden because you communicated with him  
10 though, right?

11 A. You know, I honestly don't remember communicating with  
12 Mr. Maiden directly. I may have spoken to some of his  
13 associates.

14 MR. WEITZMAN: Can we put up KIT Exhibit 3546. Can  
15 you blow up the bottom two emails, all the way to the bottom.

16 Q. If you can review that to yourself.

17 A. OK.

18 Q. Does this refresh your recollection that you communicated  
19 with a man named Stephen E. Maiden?

20 A. Yes, this looks like emails between me and -- I recollect  
21 it now.

22 MR. WEITZMAN: OK. We can take that down.

23 Q. Did that refresh your recollection that Mr. Maiden and you  
24 would communicate about KIT digital?

25 A. I can't say if it was more frequent than that or -- I

HBHQTUZ3

Ingrassia - Cross

1 didn't really get a chance to read the whole context there  
2 either, but obviously I had a -- at least that conversation  
3 with him by email.

4 Q. We'll come back to Mr. Maiden in a moment.

5 Now, you did discuss KIT digital with my client,  
6 Kaleil, correct?

7 A. Yes.

8 Q. And, in fact, sometimes you invited Kaleil to speak to your  
9 clients and investors, correct?

10 A. Yes, we'd do that for all of our CEOs and investors.

11 Q. What do you mean you do that for all your CEOs?

12 A. Well, all the companies that I covered, we would as --  
13 would give -- if we could, we would try to arrange access  
14 between investors and the CEOs, publicly, obviously.

15 Q. So you invited Kaleil to speak to your investors, right,  
16 your customers?

17 A. Yes, and he also attended our conferences where --

18 Q. And you invited him to attend your conferences?

19 A. Yes.

20 Q. Did you ever invite him to speak at one of your conference  
21 panels?

22 A. Testing my memory. I -- maybe.

23 Q. OK. You respected Kaleil at the time between 2009 and  
24 2012?

25 A. He seemed at the time like a capable CEO.

HBHQTUZ3

Ingrassia - Cross

1 Q. At the time you were impressed by what he was doing with  
2 KIT digital, correct?

3 A. Yeah, that's safe to say.

4 Q. You don't have any personal knowledge of his jobs and  
5 responsibilities, what he was doing at the company, right?

6 A. No. I know he traveled a lot.

7 Q. You don't have any personal knowledge of how he divided or  
8 how division of responsibilities was handled between him,  
9 Mr. Smyth and Mr. Campion, right?

10 A. Not specifically, no.

11 Q. Would it be fair for you -- withdrawn.

12 Would it be fair to say that Mr. Isaza Tuzman was an  
13 ambassador for the KIT digital brand?

14 MR. NAFTALIS: Objection.

15 THE COURT: Sustained. Sustained.

16 Q. You communicated with Kaleil not infrequently about stock  
17 performance, correct?

18 A. I'm sorry, about what?

19 Q. Stock performance of KIT digital.

20 A. I don't know that I would say I frequently talked to him  
21 about the stock, but I certainly talked to him on a number of  
22 occasions about the company and his strategy.

23 Q. Sometimes he reached out to you to find out what you were  
24 hearing in the marketplace?

25 MR. NAFTALIS: Objection. Time period.

HBHQITUZ3

Ingrassia - Cross

1 THE COURT: Sustained.

2 Q. In 2011, do you recall that Mr. Isaza Tuzman reached out to  
3 you to get insight about what investors are saying in the  
4 marketplace?

5 THE COURT: Sustained.

6 Q. Sir, in April of 2011, do you recall having conversation or  
7 communication with Kaleil about stock movements of KIT digital  
8 stock?

9 A. I don't recall a specific conversation, but it's not  
10 unusual for a CEO to call an analyst and see if they're hearing  
11 anything that didn't come back -- hasn't been communicated to  
12 the company yet.

13 Q. That's not an unusual thing to do, right?

14 A. No.

15 Q. Do you know the term DSOs?

16 A. Yes.

17 Q. That term refers to days sales outstanding, correct?

18 A. Correct.

19 Q. That's a measure of how long it takes the company to  
20 collect on its bills, right?

21 A. Generally, yes.

22 Q. And you recall that there came a time in 2010 when  
23 investors in the market were raising concerns about KIT  
24 digital's DSOs?

25 A. Yes, I remember as a result of some acquisitions that DSOs

HBHQTUZ3

Ingrassia - Cross

1 spiked.

2 Q. Do you recall that in 2010, you believed that the DSO issue  
3 was a short-term distraction?

4 A. That sounds like something I might have said. Yeah,  
5 typically that's the kind of fixable issue that you see in a --  
6 or at least it corrects itself over time if all goes well.

7 MR. WEITZMAN: Can we put up Government Exhibit  
8 3304-A.

9 Q. Do you see the second bullet point "DSO and euro volatility  
10 are short-term distractions"?

11 A. Yes.

12 Q. In fact, you thought that investors shouldn't care about  
13 issues such as DSOs, correct?

14 A. No, I wouldn't say that.

15 MR. WEITZMAN: Can we put up KIT Exhibit 3524. Can we  
16 turn to page 2. Bottom email. If we can highlight the first  
17 two sentences.

18 Q. Does this refresh your recollection that in May 2010, you  
19 wrote to Kaleil that "investors should care about organic  
20 revenue growth and margin expansion in a company like KIT not  
21 EPS, DSOs and currency fluctuation"?

22 MR. NAFTALIS: Objection. The witness didn't say he  
23 didn't remember anything, so I don't think this is proper  
24 refreshing.

25 THE COURT: Sustained.

HBHQ TUZ3

Ingrassia - Cross

1 Q. Is this a communication between you and Kaleil dated  
2 May 17, 2010, sir?

3 A. Yes.

4 MR. WEITZMAN: We offer KIT exhibit 2534.

5 A. Can I make a comment on this?

6 THE COURT: No. What's the government's position?

7 MR. NAFTALIS: I'm not sure what the relevance of this  
8 is.

9 THE COURT: What's the relevance?

10 MR. WEITZMAN: I can proffer it at sidebar, your  
11 Honor.

12 (Continued on next page)

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HBHQTUZ3

Ingrassia - Cross

1 (At the side bar)

2 MR. WEITZMAN: Your Honor, this goes to the  
3 materiality issues that they are raising, which is DSOs is a  
4 direct correlate to the collectability of revenues. So he's  
5 telling Kaleil that he doesn't think DSOs are all that relevant  
6 to investors. It's exactly on point to the theory of the case.

7 MR. NAFTALIS: You can ask that. I don't have  
8 objection to asking questions, but he already said he didn't  
9 agree with you on that.

10 MR. WEITZMAN: He said the opposite now in this email.

11 THE COURT: I don't think that's exactly true,  
12 Mr. Weitzman, but there's no objection. Let's just get moving,  
13 OK?

14 (Continued on next page)

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HBHQITUZ3

Ingrassia - Cross

1 (In open court)

2 THE COURT: There's no objection to 3524?

3 MR. NAFTALIS: Correct.

4 THE COURT: KIT 3524 is received.

5 (Defendant's Exhibit KIT 3524 received in evidence)

6 Q. Mr. Ingrassia, on May 17, 2010, you wrote to Kaleil, "I'll  
7 tell you what I told sales investors should care about organic  
8 revenue growth and margin expansion in a company like KIT, not  
9 EPS, DSOs and currency fluctuation."

10 Do you see that?

11 A. Yes.

12 MR. WEITZMAN: You can take that down.

13 Q. Sir, isn't it a fact that from time to time you would  
14 suggest to Kaleil particular things he should say on conference  
15 calls with investors?

16 A. I might make suggestions based on what I was hearing from  
17 investors and our sales team about what issues they might have  
18 had with the stock at the time.

19 Q. Nothing improper about that, right?

20 A. No.

21 Q. And what about the converse, were there times when Kaleil  
22 asked you to ask particular calls on investor calls?

23 THE COURT: I'm sorry?

24 MR. WEITZMAN: Sorry, I mangled that question, your  
25 Honor.



HBHQTUZ3

Ingrassia - Cross

1 Q. What about the converse, were there times when Kaleil asked  
2 you to ask particular questions on investor calls?

3 A. I don't recall that specifically, but that also wouldn't  
4 have been out of line.

5 Q. OK. Nothing improper about that either, right?

6 A. It depends on what question it was.

7 MR. WEITZMAN: OK. Can we put up KIT Exhibit 3548.

8 Q. This is a January 31, 2011 communication between you and  
9 Kaleil with a cc. to Robin Smyth, correct?

10 A. Yes.

11 MR. WEITZMAN: We offer KIT Exhibit 3548.

12 MR. NAFTALIS: No objection.

13 THE COURT: KIT Exhibit 3548 is received.

14 (Defendant's Exhibit KIT 3548 received in evidence)

15 Q. Sir, in this communication from you, you write "K." That  
16 stands for Kaleil?

17 A. Yes, it must.

18 Q. You write, "Might be helpful to say something, if you can,  
19 about cash flows in Q-4 and up to/including the deal."

20 Do you see that?

21 A. Yes.

22 Q. And then at the bottom of that paragraph you say, "Let me  
23 know and I'll ask the question," correct?

24 A. Yes.

25 Q. And by that you meant that you would ask a question about

HBHQITUZ3

Ingrassia - Cross

1 the cash flows in Q-4 up to/including the deal, correct?

2 A. Right, the sales force had questions about where the cash  
3 was going, and I thought it was important for him to point that  
4 out.

5 Q. And there's nothing improper in your discussing with the  
6 CEO potential questions you might ask on an investor call,  
7 correct?

8 A. No.

9 Q. OK. Sir, we previously mentioned Steve Maiden. Do you  
10 recall that?

11 A. Yes.

12 Q. And you couldn't recall whether you spoke to him at first,  
13 communicated with him?

14 A. Not directly with him, no.

15 MR. WEITZMAN: OK. And can we put up KIT Exhibit  
16 3539.

17 Q. Sir, does this refresh your recollection that you had  
18 direct communications with Mr. Maiden regarding KIT digital?

19 A. Yes, this is an email --

20 THE COURT: No, don't say what it is. Just does it  
21 refresh your recollection.

22 THE WITNESS: Yes.

23 THE COURT: It's a yes-or-no question.

24 THE WITNESS: OK.

25 Q. In fact, sir, it wasn't an infrequent thing for you to

HBHQTUZ3

Ingrassia - Cross

1 communicate with Mr. Maiden about KIT digital, right?

2 MR. NAFTALIS: Objection to form and time period.

3 THE COURT: Grounds?

4 MR. NAFTALIS: Time period.

5 THE COURT: Sustained. Sustained.

6 Q. Sir, in 2010, you were communicating with Mr. Maiden quite  
7 frequently, weren't you?

8 A. I don't recall how often it was.

9 Q. Do you recall communicating with him in April of 2012?

10 MR. NAFTALIS: '10 or '12, I'm not sure --

11 MR. WEITZMAN: 12.

12 MR. NAFTALIS: I thought we were just in '10. I  
13 wanted to be sure we were being clear.

14 A. Like I said --

15 THE COURT: Do you remember whether you communicated  
16 with him in April 2012?

17 THE WITNESS: I don't remember whether it was April.

18 (Continued on next page)

HBH9TUZ4

Ingrassia - cross

1 MR. WEITZMAN: Can we put up KIT Exhibit 3545.

2 Q. Sir, does this refresh your recollection that in April 2012  
3 you were communicating directly with Stephen Maiden about KIT  
4 digital?

5 A. Yes.

6 Q. And it wasn't just once in April 2012, was it, that you  
7 communicated with Mr. Maiden about KIT digital, right?

8 A. I don't know how many times it was.

9 MR. WEITZMAN: Can we put up KIT Exhibit 3541.

10 Q. Sir, does this refresh your recollection that you  
11 communicated with Mr. Maiden multiple times in April 2011  
12 regarding KIT digital?

13 A. At least two or three.

14 Q. Now you recall that Kaleil left the company, resigned, in  
15 or about March 2012?

16 A. That sounds about right.

17 Q. You recall that the stock of KIT digital took a sharp dive  
18 after he left?

19 A. It usually does when a CEO resigns.

20 Q. Dropped about 22 percent that day, right?

21 A. I don't recall.

22 Q. But after Kaleil left you continued to give KIT digital a  
23 buy rating, right?

24 A. I believe I did, yeah. I don't think I ever went from a  
25 buy rating.

HBH9TUZ4

Ingrassia - cross

1 Q. You continued to rate KIT digital at buy even after its  
2 financial statements were delayed in release, right?

3 A. Yes.

4 Q. You continued to rate KIT digital a buy even after the  
5 company disclosed a weakness in financial controls, correct?

6 A. Yes.

7 Q. You continued to give KIT digital a buy even after the  
8 company revised certain financials by management in March 2012,  
9 right?

10 A. It's possible. Like I said, I had a buy rating on it the  
11 whole time I covered it.

12 MR. WEITZMAN: Let's got to Government Exhibit 3301B.

13 Q. You recall this note that you were shown in your direct  
14 examination. This is the April 2, 2012 note.

15 A. Yes.

16 Q. Correct. And in the April 2, 2012 note on page two you  
17 were shown this part about cash investment writedown, correct?

18 A. Yes.

19 Q. Now, in fact, you considered this writedown to be a small  
20 writedown, correct?

21 A. I don't think -- well --

22 MR. WEITZMAN: Can we go to page one.

23 Can you highlight the second bullet point "small cash  
24 investment writedown."

25 Q. You considered it to be a small cash investment writedown?

HBH9TUZ4

Ingrassia - cross

1 A. Well, that's what I said but any writedown of cash --

2 Q. Sorry. I couldn't hear that.

3 A. That's what's in the bullet point, but any writedown of  
4 cash to me is, I wouldn't say big, but it's something to be of  
5 concern.

6 Q. In your direct examination you've stated that you've never  
7 seen companies write down cash.

8 Do you recall that?

9 A. I don't think I said "never." I don't remember ever seeing  
10 it before.

11 Q. Isn't it -- you recall that there was a great recession in  
12 2007, 2008?

13 A. Yeah.

14 Q. Do you recall that companies were writing down their  
15 investments left and right?

16 THE COURT: He's talking about cash.

17 MR. WEITZMAN: I understand. I'm getting there, your  
18 Honor.

19 THE COURT: Okay.

20 Q. Do you recall that? They were writing down their  
21 investments?

22 A. Yes.

23 Q. And do you recall that there was a lot of counterparty risk  
24 in 2008?

25 A. I suppose so.

HBH9TUZ4

Ingrassia - cross

1 Q. And counterparty risk is when, for instance, financial  
2 institutions that are holding your money are defaulting or  
3 collapsing, correct?

4 A. Right.

5 Q. Companies like banks, correct, were collapsing in 2008,  
6 right?

7 A. Yes.

8 Q. Insurance companies were collapsing in 2008? Do you recall  
9 that?

10 A. Yes.

11 Q. And do you recall that those collapses caused cash to be  
12 written down by many companies in 2008?

13 A. I didn't cover banks and financial institutions so I really  
14 couldn't say specifically.

15 Q. Fair enough.

16 So your knowledge is limited to the ten or twelve  
17 companies you were covering at the time?

18 A. Most of my knowledge. Yeah.

19 Q. And you weren't covering any of the companies that were  
20 writing down cash during the financial crisis?

21 A. I can't say that specifically.

22 MR. NAFTALIS: Objection. Foundation.

23 THE COURT: Sustained.

24 Q. Covering a company like KIT digital, was it important to  
25 you to see what other equity analysts were saying about KIT

1 digital?

2 A. Not necessarily.

3 Q. Did you, in fact, review other equity analysts' reports  
4 about KIT digital?

5 A. Typically that was not my -- not my policy.

6 Q. Do you recall whether you reviewed equity analyst reports  
7 issued by KIT digital from a company called JMP Securities?

8 A. I don't recall that specifically.

9 Q. Do you know an individual named Mark Harding?

10 A. Possibly. I don't recall.

11 Q. Or an individual named Jeffrey Spurr?

12 A. No. That doesn't sound familiar.

13 Q. Do you recall reading any other equity analyst reports in  
14 or about April 2012 where they said that --

15 THE COURT: No. Just ask the question. Do you recall  
16 reading any -- any other analysts' reports in or about  
17 April 2012 about KIT digital?

18 THE WITNESS: I don't recall specifically but I may  
19 have, yes.

20 MR. WEITZMAN: Can we put up KIT Exhibit 3519.

21 MR. NAFTALIS: Your Honor, can we have a sidebar  
22 briefly.

23 THE COURT: If we must.

24 (Continued on next page)



1 (At the sidebar)

2 MR. NAFTALIS: I apologize for doing this but I just  
3 don't want there to be a question where he's reading from a  
4 document.

5 THE COURT: That's why I broke into the question.

6 MR. NAFTALIS: I think all of us agree that these  
7 documents are hearsay so that you can't -- they are only  
8 offered for state of mind.

9 THE COURT: So what's your intention? Are you going  
10 to show him the document?

11 MR. WEITZMAN: First of all, I'm going to ask him if  
12 he read it.

13 THE COURT: It seems likely that the answer is going  
14 to be no.

15 What's the next question?

16 MR. WEITZMAN: In any event, I would offer the  
17 document only for state of mind.

18 THE COURT: How are you going to offer the document?

19 MR. WEITZMAN: This it was actually on the  
20 government's exhibit list.

21 THE COURT: That's fine but that doesn't mean it's  
22 admissible.

23 MR. WEITZMAN: There is no dispute as to authenticity.  
24 So I'm going to offer it for the purpose of the state of mind  
25 of the writer.

1 MR. NAFTALIS: That he never read it?

2 THE COURT: We're wasting time.

3 MR. WEITZMAN: Okay.

4 (Continued on next page)

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1 (In open court)

2 Q. Sir, do you recall whether you read this equity analyst's  
3 report in April 2012?

4 A. I don't recall.

5 Q. And nothing about the report refreshes your recollection  
6 about that?

7 A. Not really, no. It's five-and-a-half years ago.

8 Q. Now you've spoken to the prosecutors here how many times  
9 before your testimony today?

10 A. Just once on the phone from home and then Wednesday this  
11 week.

12 Q. So two conversations with Mr. Naftalis and others?

13 A. Yes.

14 Q. And was this the first time that you ever spoke to  
15 prosecutors?

16 A. Yes.

17 Q. And was the SEC on those calls?

18 THE COURT: I thought he talked about one call and a  
19 meeting.

20 MR. WEITZMAN: Yes, your Honor. You're correct, your  
21 Honor.

22 Q. Was the SEC on the call or present at the meeting?

23 A. Was a representative of the SEC on my call with  
24 Mr. Naftalis?

25 Q. Yes.

1 A. No.

2 Q. Was a representative of the FBI or the U.S. Postal  
3 Inspection Service on the call?

4 A. Yes.

5 Q. And you understand that the prosecutors and the postal  
6 inspection service and the FBI, that part of their charge is to  
7 enforce the securities laws, correct?

8 A. I don't know that specific call but, okay, yeah.

9 Q. And one of the securities laws that are enforced is a law  
10 called Reg AC, correct?

11 MR. NAFTALIS: Objection, your Honor. I'm not sure  
12 where we're going here. Foundation as well.

13 THE COURT: Yes. Sustained.

14 Q. Are you familiar with Reg AC, sir?

15 THE COURT: Yes or no.

16 THE WITNESS: No.

17 THE COURT: Next question.

18 Q. Sir, have you heard of Regulation Analyst Certification?

19 A. Analyst certification I'm familiar with.

20 Q. And analyst certification is something that you did as a  
21 analyst in connection with each of your equity research analyst  
22 reports, correct?

23 A. Yes. That was standard procedure.

24 Q. And what that analyst certification is, is that you believe  
25 in the content of your report, correct?

1 A. Yes.

2 Q. And you understand that that's a SEC requirement that you  
3 believe in your certification, correct?

4 A. Yes.

5 MR. WEITZMAN: In fact, let's put up KIT Exhibit 3514.

6 Turn to -- actually take that down. That's okay.

7 Q. You understand that if you were to issue an analyst report  
8 that you did not believe in, that would be a violation of the  
9 securities laws, correct?

10 A. Yes.

11 Q. And that that could get you in trouble with the SEC,  
12 correct?

13 A. Yes.

14 Q. And it can get you in trouble with prosecutors as well,  
15 right?

16 A. Yes.

17 Q. Do you recall that there came a time in May 2012 where KIT  
18 digital entered into an agreement for the sale of \$29 million  
19 in equity?

20 A. That sounds familiar.

21 MR. NAFTALIS: Objection. Relevance.

22 MR. WEITZMAN: I'll connect it, your Honor.

23 THE COURT: All right. I'll see where it goes.

24 Q. And the agreement that KIT digital entered into in May 2012  
25 that was after Kaleil left the company, correct?

1 A. Is that the fact --

2 THE COURT: No, don't -- he's asking you if you know  
3 this. You can't rely on the question. Okay.

4 THE WITNESS: Okay.

5 THE COURT: So repeat the question, Mr. Weitzman.

6 MR. WEITZMAN: I'll break it down.

7 Q. You recall that you testified earlier that Kaleil left the  
8 company in March 2012?

9 A. Yes.

10 Q. And so the equity sale of \$29 million in May 2012 was after  
11 Kaleil left the company, correct?

12 A. Yes.

13 Q. That was by new management within the company, correct?

14 A. Yes.

15 Q. And you recall that you thought the terms of this financing  
16 were really onerous?

17 A. I don't recall.

18 Q. Do you recall that the terms of the financing is what's  
19 called in the industry a debt spiral?

20 MR. NAFTALIS: Objection, your Honor. Relevance.

21 THE COURT: Yes. We'll have to discuss it.

22 (Continued on next page)  
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1 (At the sidebar)

2 MR. WEITZMAN: Yes, your Honor. I have documents that  
3 show that this individual understood that there was a financing  
4 of the company that would result in a debt spiral to the  
5 company; that notwithstanding that he continued to issue a buy  
6 rating and part of the reason he did that was because the  
7 chairman of his company told him that they can't -- they can't  
8 downgrade or they can't -- they can't issue a negative release  
9 about KIT digital because they were investors in KIT digital.  
10 And this is necessary to prove bias and motivation to curry  
11 favor with the prosecutors.

12 MR. NAFTALIS: Oh, please, because he has to comply  
13 with the rules of the company that they can't change a rating  
14 when they are underwriting security you're saying that's bias  
15 to us?

16 MR. WEITZMAN: Yes because --

17 MR. NAFTALIS: At the time in 2012 it's bias to us?

18 MR. WEITZMAN: That's not the issue, Mr. Naftalis.

19 He's an individual who did not -- who violated Reg AC.  
20 He did not report his true beliefs based on the e-mails I have  
21 and because of that he has to curry favor with the prosecutors  
22 today, not back in 2012.

23 THE COURT: Well I mean you can explore that with him.  
24 You'll be bound by his answers.

25 MR. WEITZMAN: Of course.

1 MR. WILLIAMS: Can we have a proffer.

2 MR. NAFTALIS: What you're going into because I don't  
3 understand it. I don't want to make a misimpression with the  
4 jury that there's actually anything here based on the  
5 questions. I don't really understand what --

6 THE COURT: He's already made a proffer of what he  
7 intends to ask.

8 MR. NAFTALIS: That he was currying favor?

9 THE COURT: No. That he's got a motive now to curry  
10 favor with you based on what happened in 2012.

11 MR. WILLIAMS: That's fine. How much longer do you  
12 have?

13 MR. WEITZMAN: It depends on his answers. It's not  
14 going to be very long.

15 (Continued on next page)

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1 (In open court)

2 Q. Mr. Ingrassia, are you familiar with the term debt spiral  
3 financing?

4 A. Yes.

5 Q. That is a type of financing that occurs when an issuer like  
6 KIT digital issues -- issues stock with really onerous terms,  
7 right?

8 A. Yes.

9 Q. And one of the onerous terms is that if the stock reduces  
10 in price below a particular level the company issues more stock  
11 to the buyer of the stock, right?

12 A. Correct.

13 Q. And even if it continues to spiral downward, the stock  
14 price, the company has to give cash to the buyer of the stock,  
15 right?

16 A. I don't know if that's the case in every financing of that  
17 kind.

18 Q. But the term debt spiral financing is a term that you  
19 understood what that meant, right, in 2012?

20 A. Yes.

21 Q. And, sir, in May of 2012 the company issued financing, \$29  
22 million of stock in what's called debt spiral financing; isn't  
23 that correct?

24 A. It's not specifically called that but it may have been  
25 referred to that -- referred as that.

1 Q. You believed the financing terms were a debt spiral for the  
2 company in May 2012, right?

3 A. I don't recall.

4 Q. Sir, do you recall having a conversation in May 2012 with  
5 Stephen Maiden about the debt spiral financing that KIT digital  
6 issued in May 2012?

7 A. I don't recall it specifically, but I may have.

8 MR. WEITZMAN: Can we put up KIT Exhibit 3546.

9 Can we highlight the two e-mails in the middle.

10 Q. These are communications between yourself and Mr. Maiden,  
11 correct?

12 A. Yes.

13 MR. WEITZMAN: We offer KIT Exhibit 3546.

14 MR. JACKSON: No objection.

15 MR. NAFTALIS: Your Honor I think we're refreshing  
16 recollection here, if the question was to refresh recollection.

17 MR. WEITZMAN: This goes to state of mind.

18 THE COURT: I don't understand. I think he's offering  
19 it -- you're offering it, right?

20 MR. WEITZMAN: I am.

21 THE COURT: So he's not using it to refresh  
22 recollection. He's seeking to offer it.

23 MR. NAFTALIS: No objection.

24 THE COURT: 3546 is received.

25 (Defendant Exhibit KIT 3546 received in evidence)

1 Q. Sir, on May 17, 2012 Steve Maiden e-mailed you and he said,  
2 "So this looks like a debt spiral deal. Are there limits to  
3 this? Does this force the company to sell? Crazy bad  
4 offering."

5 Do you see that?

6 A. Yes.

7 Q. And at 10:51 a.m. you wrote, "Exactly the point I'm hung up  
8 on and why I'm not published yet. I'm writing this up for as  
9 bad as it is and I need to have it right."

10 Do you see that?

11 A. Yes.

12 Q. In May 2012, sir, you agreed with Mr. Maiden that this was  
13 a debt spiral financing, correct?

14 A. It looked pretty bad, yeah.

15 Q. You didn't think this was a good move for the company,  
16 right?

17 A. Not in this respect, no. In financing.

18 Q. You issued a note the next day, correct?

19 A. Probably.

20 MR. WEITZMAN: Can we put up KIT Exhibit 3521.

21 Can we put up -- this is the note that you issued on  
22 May 18, 2012?

23 THE WITNESS: Yes.

24 MR. WEITZMAN: We offer KIT Exhibit 3521.

25 MR. NAFTALIS: With the same limitation, no objection.

1 MR. JACKSON: No objection, your Honor.

2 THE COURT: This would be received, ladies and  
3 gentlemen, for state of mind just as the other analyst reports  
4 were received. So with that limitation 3521 is received.

5 (Defendant Exhibit KIT 3521 received in evidence)

6 MR. WEITZMAN: If you would highlight the first  
7 paragraph under 2012 revisions.

8 Q. You wrote, "Much remains to be done before shares are  
9 recognized for the value of the underlying business, and the  
10 structure of the recent equity raise creates yet another  
11 overhang on the stock," correct?

12 A. Yes.

13 Q. Nothing in this report referred to debt spiral financing,  
14 using those terms, correct?

15 THE COURT: Do you remember?

16 THE WITNESS: I don't remember. But that's obviously  
17 slang.

18 Q. You continued to issue a buy rating for the company at this  
19 time, correct?

20 A. Yeah, because my values --

21 Q. Hold on a second. I just wanted a yes or no. You  
22 continued to issue a buy rating --

23 A. Yes. As I said, I had a buy rating on it.

24 Q. And you continued to issue the buy rating even though you  
25 believed that the terms of the financing offered days prior

1 could result in a debt spiral for the company, correct?

2 A. Yes, because a financing doesn't necessarily have relevance  
3 to the value of the stock.

4 Q. You understood, sir, that the debt spiral financing that  
5 you knew about could result in a bankruptcy for the company,  
6 correct?

7 A. I don't know that I thought it would be a bankruptcy but it  
8 could certainly harm the shareholders.

9 Q. And you didn't mention -- withdrawn.

10 Sir, your company ROTH Capital owned a substantial  
11 position in KIT digital in May 2012; isn't that correct?

12 A. I don't know if we owned a portion of the company.

13 Q. You at some point between 2010 and 2012 you are aware ROTH  
14 Capital was an investor in KIT digital, right?

15 A. Again, I don't know that they were an investor. We -- KIT  
16 digital was an investment banking client. So we helped them  
17 raise money on several occasions.

18 MR. WEITZMAN: Could we go to page -- the final -- the  
19 second to last page of this document. And can we highlight the  
20 first disclosure.

21 Q. This is the May 18, 2012 equity issue -- equity report you  
22 issued. And it says, "Disclosures Roth and/or its employees,  
23 officers, directors and owners own options, rights or warrants  
24 to purchase shares of KIT digital, Inc. stock. Roth makes a  
25 market in shares of KIT digital, Inc. and as such buys and

1 sells from customers on a principal basis."

2 Do you see that?

3 A. Yes.

4 Q. And in addition to that, Roth also was one of the  
5 investment bankers to KIT digital, right?

6 A. Correct.

7 Q. Roth generated substantial fees as a result of that  
8 relationship, right?

9 A. Yes.

10 Q. And as a result of the relationship with KIT digital you  
11 had an incentive not to downgrade KIT digital, after my client  
12 left the company, to a sell, correct?

13 A. No. My research was always independent of anything on the  
14 banking side.

15 Q. Okay. Who was the chairman of your company at Roth?

16 A. Byron Roth.

17 Q. Isn't it a fact, sir, that Byron Roth told you that you  
18 can't issue negative commentary on KIT digital?

19 A. I don't recall that at all.

20 Q. Isn't it a fact, sir, that Byron Roth told you that issuing  
21 negative commentary on KIT digital would be like shooting  
22 yourselves in the foot since you guys are owners of KIT digital  
23 stock?

24 A. No.

25 MR. WEITZMAN: Putting up KIT Exhibit 3527. Can we

1 put up page one and page two.

2 Q. Is this is an e-mail exchange on which you are a recipient,  
3 correct, Mr. Ingrassia?

4 A. Yes.

5 Q. And it involves Kaleil and your chairman, Byron Roth,  
6 correct?

7 A. Yes.

8 MR. WEITZMAN: We offer KIT Exhibit 3527.

9 MR. NAFTALIS: Objection, your Honor.

10 THE COURT: You object?

11 MR. NAFTALIS: We can let --

12 THE COURT: Do you want to approach?

13 MR. NAFTALIS: What is the offering for?

14 THE COURT: Do you want to approach?

15 MR. NAFTALIS: Yes.

16 (Continued on next page)

1 (At the sidebar)

2 MR. NAFTALIS: This is from 2010. They are trying to  
3 impeach him for something that happened in 2012.

4 MR. WEITZMAN: Yes. There's a directive here in this  
5 e-mail and I'm entitled to elicit and get the fair inferences  
6 resulting from it that the chairman of his company tells him --

7 THE COURT: Where is that?

8 MR. WEITZMAN: Bottom e-mail. Sorry. Kaleil says,  
9 "Gents, I just heard from two of our shareholders that Roth was  
10 out with negative commentary..."

11 THE COURT: I'm sorry. I can't see what you're  
12 reading.

13 MR. WEITZMAN: I apologize, your Honor. If I can take  
14 your binder, I'll highlight it for you.

15 This part is Kaleil's e-mail. And on June 2010 he  
16 says, "Gents I just heard from two of our shareholders that  
17 Roth was out with negative commentary on KIT digital," from the  
18 chairman of his firm on an e-mail that he's cc'd on says, "We  
19 own shares, shares we bought in market and not just warrants  
20 and would be literally shooting ourselves in the foot. Let us  
21 know if you hear anything specific and we'll address it right  
22 away. It is brutal out there."

23 MR. WILLIAMS: Is that a directive?

24 THE COURT: It doesn't seem like a directive to me.

25 MR. WEITZMAN: It's a fair inference for me to ask him



1 whether he took it as the chairman of his firm saying he  
2 shouldn't --

3 THE COURT: I don't know. So let me tell you what I  
4 think a fair inference is. Mr. Tuzman is saying that he heard  
5 that Roth was putting in a negative commentary and what I  
6 understand Byron Roth to say in response is: No, we're not  
7 doing that and if we were to do that it would be like shooting  
8 ourselves in the foot.

9 MR. WEITZMAN: Exactly. I agree with that, your  
10 Honor. And I think that's the impeachment I'm seeking.

11 THE COURT: I don't think it's impeachment, but you  
12 can ask him -- you can ask them if he viewed that as a  
13 directive from Byron Roth not to say anything mean about KIT  
14 digital.

15 MR. WEITZMAN: Right. Thank you, your Honor.

16 (Continued on next page)

17  
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25

1 (In open court)

2 MR. WEITZMAN: Your Honor, we offer KIT Exhibit 3527.

3 THE COURT: Anything else you want to say,

4 Mr. Naftalis?

5 MR. NAFTALIS: No.

6 THE COURT: Are you objecting to 3527?

7 MR. NAFTALIS: No.

8 THE COURT: 3527 is received.

9 (Defendant Exhibit KIT 3527 received in evidence)

10 MR. WEITZMAN: Can we highlight page two, the top  
11 e-mail from Kaleil.

12 Q. Sir, there is an e-mail from Kaleil to yourself, several  
13 other people at your company, correct, and Byron Roth?

14 A. Yes.

15 Q. And it's dated June 8, 2010, correct?

16 A. Yes.

17 Q. And its subject is "Roth commentary on KIT digital," right?

18 A. Yes.

19 Q. And Kaleil says, "Gents I just heard from two of our  
20 shareholders that Roth was out with negative commentary on KIT  
21 digital? Anything of which I should be aware?"

22 Do you see that?

23 A. Yes.

24 Q. And turn to Mr. Roth's response. Page one bottom e-mail.

25 Byron Roth, sir, is the chairman of your firm that you

1 worked at at the time?

2 A. Yes.

3 Q. And on June 8, 2010 he e-mails Kaleil back on an e-mail  
4 that you are a recipient, correct?

5 A. Yes.

6 Q. And he says, "We own shares (shares we bought in market not  
7 just warrants) and would be literally shooting ourselves in the  
8 foot. Let us know if you hear anything specific and we will  
9 address it right away. It is brutal out there."

10 Do you see that?

11 A. Yes.

12 Q. Sir you, understood that if you were to issue negative  
13 commentary about KIT digital after Kaleil departed as the CEO  
14 you would be hurting Roth's equity interest in KIT digital?  
15 Did you understand that, yes or no?

16 A. No.

17 MR. NAFTALIS: Objection, this is confusing.

18 THE COURT: All right. The answer is no.

19 MR. WEITZMAN: No further questions.

20 THE COURT: All right.

21 Mr. Jackson, sir.

22 MR. JACKSON: Your Honor, I have less than three  
23 minutes of questions.

24 THE COURT: Okay.

25 (Continued on next page)

HBH9TUZ4

Ingrassia - cross

1 CROSS-EXAMINATION

2 BY MR. JACKSON:

3 Q. Good morning, sir -- good afternoon.

4 A. Good afternoon.

5 Q. Now, sir, my -- can we call up Government Exhibit 218.

6 Now, sir, this is one of the documents that you looked at with  
7 the government on your direct examination, right?

8 A. Yes.

9 MR. JACKSON: Can we go to page 100 of this document.

10 If you can blow up the top half of this.

11 Q. You see here sir that this entire section of this 10-K is  
12 talking about KIT Media, right?

13 A. The first paragraph is -- refers to KIT Capital.

14 Q. Right. Part of it refers to KIT Capital and then another  
15 part refers to KIT Media, correct?

16 A. Yes. And then the last one refers to KIT Capital.

17 Q. Right. And as an analyst you were familiar with the fact  
18 that through KIT Capital and KIT Media investments were made in  
19 KIT digital, right?

20 A. From these filings, yes.

21 Q. This was something that was publicly disclosed in the SEC  
22 filings, right?

23 A. Yes.

24 Q. And there's nothing wrong from your perspective, there was  
25 nothing wrong with the use of a vehicle like KIT Media, right?

HBH9TUZ4

Ingrassia - cross

1 A. I can't say that I analyzed it very closely.

2 Q. Sure. But you are aware of the 10-Ks, right?

3 A. Yes.

4 Q. And you're aware that everything that's in the 10-K was  
5 part of a public filing about the company, right?

6 A. Right.

7 Q. Now, as an analyst you rely on experts sometimes, don't  
8 you, to help you understand transactions?

9 A. What do you mean by experts?

10 Q. Well do you ever consult with experts to get a deeper  
11 understanding of something that you're looking at?

12 A. I might ask others in our firm.

13 Q. Did you ever ask others outside your firm?

14 A. Not that I recall.

15 Q. But sometimes you would ask other people at your firm who  
16 might have more expertise in an area than you did, right?

17 A. Right. I wasn't a banker. I was an analyst.

18 Q. So even though you were one of the people who was  
19 specifically paid to analyze this company, there were  
20 transactions that you wouldn't necessarily understand, right?

21 A. It's possible, but I would try.

22 Q. And then you would sometimes talk to bankers, people who  
23 were bankers who had more sophistication about areas that you  
24 didn't understand, correct?

25 A. Maybe just to understand the terms after the fact.

HBH9TUZ4

Ingrassia - cross

1 Q. Right. To understand the terms and perhaps to also  
2 understand the nature of what you were looking at, correct?

3 A. Yes.

4 Q. Now, remind me, again, what's your education?

5 A. University of Notre Dame and Northwestern.

6 Q. What degrees do you have?

7 A. Economics at Notre Dame and journalism at Northwestern.

8 Q. And do you have any kind of certifications from FINRA or  
9 anything?

10 A. No. I'm a licensed rep.

11 Q. Great. You mentioned a system you used called BlueMatrix?

12 A. Yes.

13 Q. And just in very, very brief summary, in like one sentence,  
14 what is BlueMatrix?

15 A. It's a online publishing platform for research.

16 Q. Now, one of the things that you talked about during your  
17 testimony, do you remember, was this idea that you had never  
18 heard of a CEO paying a person to buy stock. Do you remember  
19 that?

20 A. Yes.

21 Q. And you remember Mr. Naftalis showed you a document that  
22 you talked about, this December 2008 agreement that you looked  
23 at?

24 A. Right.

25 Q. And Mr. Weitzman asked you: You're not an expert in

HBH9TUZ4

Ingrassia - cross

1 analyzing those kinds of agreements, right?

2 A. Correct.

3 Q. But it is a fact, isn't it, that you are familiar with CEOs  
4 incentivizing people to purchase stock, correct?

5 MR. NAFTALIS: Objection to form. It's vague.

6 THE COURT: Sustained.

7 Q. Let me ask you a more specific question. You are -- you  
8 generally -- you were an analyst during 2008, right?

9 A. Yes.

10 Q. So even though you were covering specific companies you  
11 were aware of the global market crisis going on at the time,  
12 right?

13 A. Yes.

14 Q. You were reading the Wall Street Journal everyday, right?

15 A. Maybe not everyday but, yes.

16 Q. You were following the news about it?

17 A. Yes.

18 Q. You were aware of the general market forces going on,  
19 right?

20 A. Generally.

21 Q. You were aware of Warren Buffett's investment in Goldman  
22 Sachs in 2008, correct?

23 A. No. I can't say that specifically.

24 Q. You don't remember at all the transactions where Warren  
25 Buffett invested a tremendous amount in Goldman Sachs? You had

HBH9TUZ4

Ingrassia - cross

1 no familiarity with that?

2 A. It sounds familiar but I don't know specifics.

3 Q. I'm not asking you about the specifics, but you're  
4 generally aware of it, right?

5 A. Yes.

6 Q. You don't remember the specifics?

7 A. No.

8 Q. But you do remember that when Warren Buffett did that  
9 Goldman Sachs incentivized him by providing him with an  
10 outsized dividend, right?

11 A. Like I said, I don't know the specifics.

12 Q. I just want to show you something and I want to ask you if  
13 it refreshes your recollection. This is a document marked as  
14 Amanat Exhibit 406.

15 I just want you to take a look at that for a moment.

16 A. Okay.

17 Q. Having looked at that, does that refresh your recollection  
18 that Warren Buffett got certain incentives in connection with  
19 his purchase of stock in Goldman Sachs?

20 MR. NAFTALIS: Objection to form.

21 Q. That Warren Buffett or Berkshire Hathaway, through  
22 Berkshire Hathaway got certain incentives in connection with  
23 the purchase of stock?

24 A. That's the way the Wall Street Journal saw it.

25 THE COURT: Again, we're not interested really in what



HBH9TUZ4

Ingrassia - cross

1 the Wall Street Journal thinks about it. The question is  
2 whether it refreshes your recollection that Warren Buffett  
3 received a larger dividend in exchange for his agreement to buy  
4 the stock. Does that document refresh your recollection on  
5 that?

6 THE WITNESS: No.

7 Q. Putting that aside, you are aware that sometimes investors  
8 get incentives for making investments, right?

9 THE COURT: That's too broad.

10 MR. JACKSON: That's too broad, your Honor.

11 Q. You are aware that sometimes in the connection with the  
12 purchase of stock, a company will provide for specifically --  
13 specific terms that incentivize that particular investment in  
14 stock, correct?

15 A. No. As an analyst we live in a different world. I keep my  
16 head down on the company.

17 Q. So your testimony is you -- that's not -- that whole area  
18 is not really something that you even cover as an analyst?

19 A. It's not my expertise.

20 Q. It's not your expertise.

21 So to the extent that you were being asked about that  
22 on direct, that's really outside of the scope of what you know  
23 about?

24 THE COURT: Sustained.

25 Q. Just to end up. It's a fact, isn't it, sir, that during

HBH9TUZ4

Ingrassia - redirect

1 the course of all your coverage of KIT digital you never had  
2 any dealings with Omar Amanat, correct?

3 A. I don't recall any dealings with him, no.

4 MR. JACKSON: Okay. Thank you, sir. No further  
5 questions for you.

6 THE COURT: Any redirect.

7 MR. NAFTALIS: Yes. Very brief, your Honor.

8 REDIRECT EXAMINATION

9 BY MR. NAFTALIS:

10 Q. Mr. Ingrassia, let's pick up where Mr. Jackson left off.  
11 He asked you some questions about Warren Buffett and Goldman  
12 Sachs. And the gist was that whether Warren Buffett was  
13 getting certain incentives or his firm was getting certain  
14 incentives when it invested in Goldman Sachs?

15 A. Yes.

16 Q. Is your knowledge of that based on things you read in the  
17 paper?

18 A. Yes.

19 Q. Things that were publicly disclosed?

20 A. Things that I read just now.

21 Q. Did you ever -- you saw that December 2009 agreement, 2008  
22 agreement between --

23 A. Was that the one between Maiden and --

24 Q. Yes between Maiden, Mr. Amanat, Mr. Tuzman. Do you  
25 remember that document?

HBH9TUZ4

Ingrassia - redirect

1 A. Yes.

2 Q. Did you ever see any reporting about that in the paper?

3 A. No.

4 Q. Did you ever seeing anything about that in the financial  
5 statements?

6 A. No. I don't recall.

7 Q. You were asked some questions by Mr. Weitzman about your  
8 buy rating on KIT digital, correct?

9 A. Yes.

10 Q. And fair to say you rated KIT a buy for basically the  
11 entire time you covered the stock, right?

12 A. Yes.

13 Q. And that was based in part on your review of KIT's  
14 financial statements, right?

15 A. It was based almost entirely on my review of their  
16 financial statements.

17 Q. And you assumed those statements were true and accurate?

18 A. Yes.

19 Q. You relied on that?

20 A. Yes.

21 Q. And Mr. Tuzman signed the 10-Qs and 10-Ks saying these are  
22 real, these are accurate, there is no fraud?

23 A. Yes.

24 Q. And you relied on that?

25 A. Yes.

HBH9TUZ4

Ingrassia - redirect

1 Q. Now you were asked some questions about who Roth's  
2 customers are, meaning trading customers?

3 A. Yes.

4 Q. Some of the customers are hedge funds?

5 A. Yes.

6 Q. Some are mutual funds?

7 A. Yes.

8 Q. Some are what are called retail investors?

9 A. Yes.

10 Q. Regular people?

11 A. No. High net worth.

12 Q. High net worth people?

13 A. Yes.

14 Q. They have access to your research?

15 A. Yes.

16 Q. Mr. Weitzman asked you some questions, and he pointed you  
17 to something in a report where, about the concept of DSOs, days  
18 sales outstanding?

19 A. Yes.

20 Q. Are those important to you days sales outstanding?

21 A. Yes, to a degree.

22 Q. Can you explain to the jury what that concept is and why  
23 it's important to you.

24 A. It's a measure of how long it's taking a company to collect  
25 revenues on product or services that they have sold and

HBH9TUZ4

Ingrassia - redirect

1 generally expect that to be -- well it depends on the industry  
2 but 60 to 90 days.

3 Q. And when you were looking at the days sales outstanding did  
4 you have an understanding one way or another whether the  
5 customers who owed KIT digital money were real?

6 A. I'm sorry. Ask the question again.

7 Q. When you were considering whether the days sales  
8 outstanding, the number, did you assume that the sales were  
9 real, meaning real customers owed KIT digital real money?

10 A. Of course.

11 Q. Mr. Weitzman also asked you some questions about your  
12 communications with Stephen Maiden?

13 A. Right.

14 Q. Stephen Maiden, to your recollection did you ever actually  
15 reach out yourself to Stephen Maiden?

16 A. Not to my recollection. And I will say that I spoke to  
17 hundreds of portfolio managers over my career at Roth.  
18 Obviously I should have remembered that I spoke to Stephen or  
19 at least traded e-mails with him but I don't remember speaking  
20 to him.

21 Q. To be clear, investors reach out to you, right?

22 A. Yes.

23 Q. And investors who hold a particular stock reach out to you  
24 about stocks you cover, right?

25 A. Yes.

HBH9TUZ4

Ingrassia - redirect

1 Q. You were one of the leading analysts that covered Roth,  
2 correct?

3 A. That covered KIT digital.

4 THE COURT: That covered Roth?

5 Q. Covered KIT digital?

6 A. Yes.

7 Q. To your recollection, did you ever yourself reach out to  
8 Stephen Maiden?

9 MR. WEITZMAN: Objection. Asked and answered.

10 THE COURT: I think it was but what do you recall.

11 THE WITNESS: I don't recall reaching out to him,  
12 prompting a conversation, no.

13 Q. Anything different about the reach outs from Mr. Maiden to  
14 you from other hedge fund analysts?

15 A. No. It was pretty typical. It may not be by e-mail, by  
16 phone.

17 Q. You were also asked some questions by Mr. Weitzman about  
18 that \$2 million that was written off from KIT's balance sheet  
19 in 2012?

20 A. Right.

21 Q. And then he jumped back to 2007 and '8 to the financial  
22 crisis. Do you remember that?

23 A. Yes.

24 Q. And he said investments were written off?

25 A. Yes.

HBH9TUZ4

Ingrassia - redirect

1 Q. Was there a financial crisis in 2012?

2 MR. WEITZMAN: Objection. Relevance.

3 THE COURT: Overruled.

4 A. Not that I'm aware of.

5 MR. NAFTALIS: Let's also put up Government Exhibit --  
6 I think it's Amanat -- Tuzman Exhibit 3527.

7 If Mr. Tuzman's counsel can put that up. We don't  
8 have that. We just got it.

9 Q. Now, again, do you remember, just like with the cash  
10 questions you were talking about 2012 and then there were  
11 questions that jumped back in time. Do you remember that?  
12 There were questions about Mr. Roth?

13 A. Yes.

14 Q. There was a capital raise that KIT digital did after Tuzman  
15 left the company in May of '12?

16 A. Yes.

17 Q. And then he asked you questions about what you did or  
18 didn't do with respect to communications with Byron Roth?

19 A. Yes.

20 Q. So just to be clear the capital raise was 2012, correct?

21 A. The one in question, yes.

22 Q. And this e-mail is from when?

23 A. June 2010.

24 Q. Any connection between this e-mail and the capital raise in  
25 2012?

HBH9TUZ4

Ingrassia - redirect

1 A. No.

2 MR. WEITZMAN: Objection. Vague.

3 THE COURT: Overruled.

4 Q. I don't know if we got the answer.

5 Any connection between this e-mail in 2010 and --

6 A. No. There couldn't have been.

7 Q. And, finally, your recommendation says to buy or sell. Did  
8 you believe in all those recommendations.

9 A. Yes.

10 MR. NAFTALIS: No further questions.

11 THE COURT: Anything else?

12 MR. JACKSON: Nothing from us. Thank you, your Honor.

13 MR. WEITZMAN: Nothing, your Honor.

14 THE COURT: You may step down, sir.

15 Ladies and gentlemen we're going to take our afternoon  
16 break. So be back to you shortly. Keep an open mind. There  
17 is more evidence to hear. Don't discuss the case. Be back to  
18 you shortly.

19 (Jury not present)

20 THE COURT: You can step down Mr. Ingrassia.

21 (Witness excused)

22 THE COURT: All right. We'll resume -- do you have  
23 something you want to take up?

24 MR. McRAE: Just wanted to give you your binders now.

25 THE COURT: That would be great.



HBH9TUZ4

Ingrassia - redirect

1                   We'll resume shortly with the cross-examination of  
2                   Mr. Smyth.

3                   (Recess)

HBHQITUZ5

Smyth - Cross

1 (Jury present)

2 THE COURT: Ladies and gentlemen, we will now hear the  
3 cross-examination of Mr. Smyth.

4 Mr. McRae.

5 MR. McRAE: May I inquire, your Honor?

6 THE COURT: Please.

7 ROBIN SMYTH, resumed.

8 CROSS-EXAMINATION

9 BY MR. McRAE:

10 Q. Good afternoon, Mr. Smyth.

11 A. Good afternoon.

12 Q. Sir, from 2010 to 2012, you told many lies to many people  
13 about KIT digital's financial condition, correct?

14 A. Correct.

15 Q. Sir, from 2010 to 2012, when you made false statements  
16 about KIT digital's financial condition, your goal was to  
17 mislead people, correct?

18 A. Yes.

19 Q. Between 2010 and 2012, you used false and deceptive means  
20 to misrepresent KIT digital's true financial health to  
21 shareholders, right?

22 A. Yes.

23 Q. The investing public, right?

24 A. Yes.

25 Q. Independent auditors, right?

HBHQTUZ5

Smyth - Cross

1 A. Yes.

2 Q. And the Securities and Exchange Commission, correct?

3 A. Yes.

4 Q. So lying to people without being detected is something you  
5 have experience with, right?

6 A. In these cases, yes.

7 Q. I'm sorry, sir, could you say that again?

8 A. In these cases, yes.

9 Q. And from 2010 to 2012, you also schemed to recognize  
10 revenue for perpetual license contractors for KIT digital  
11 software knowing that KIT digital had not delivered a finished  
12 product to the customer, right?

13 A. Yes.

14 Q. So you lied about KIT digital's revenues also, correct?

15 A. Yes.

16 Q. And, sir, at times you even created illusory contracts,  
17 correct?

18 A. Yes.

19 Q. Sham contracts, right?

20 A. Yes.

21 Q. And during your direct examination, you talked about many  
22 documents you created and helped create that were also fake.  
23 Is that right?

24 A. Yes.

25 Q. Yes. We just mentioned one of the them a second ago, sham

HBHQTUZ5

Smyth - Cross

1 licenses?

2 A. Yes.

3 Q. You also created false auditor licenses, right?

4 A. Yes.

5 Q. Fake clients, right?

6 A. Yes. I didn't create them, but yes, there were false  
7 clients.

8 Q. As well as false bank account information that you  
9 provided, right?

10 A. Yeah, I organized that. Yes.

11 Q. So part of your frauds and lies from 2010 to 2012 involved  
12 creating false records that you would then use to support false  
13 stories that you wanted people to believe, right?

14 A. Yes.

15 Q. So using fake documents to support lies is also something  
16 you have experience with, right?

17 A. Yes.

18 Q. And to avoid detection of the frauds you committed at KIT  
19 digital, you concealed your frauds from 2010 to 2012, didn't  
20 you?

21 A. Yes.

22 Q. For example, you concealed your improper revenue  
23 recognition scheme from the public and independent auditors  
24 intending for them to be misled by your statements, right?

25 A. Could you repeat that question?

HBHQTUZ5

Smyth - Cross

1 Q. Certainly. You concealed your improper revenue recognition  
2 scheme from the public and independent auditors intending for  
3 them to be misled by your statements, correct?

4 A. Yes.

5 Q. So concealing the truth from people is yet another thing  
6 with which you have considerable experience, correct?

7 A. Yes.

8 Q. So you even deceived people who worked with you every day  
9 at KIT digital for years by concealing your fraudulent activity  
10 from them, right?

11 A. Some of the people worked with me, yes.

12 Q. You understood that being the chief financial officer at  
13 KIT digital was a position of trust, right?

14 A. Yes.

15 Q. You abused that trust?

16 A. I did.

17 Q. You abused that trust repeatedly, correct?

18 A. Yes.

19 Q. And, sir, you would agree that in order to conduct all the  
20 fraudulent transactions while concealing your wrongdoing, it  
21 required a certain level of skill in convincing people that you  
22 were telling the truth when in fact you were lying, right?

23 A. Yes.

24 Q. That's a skill that you possess, right?

25 A. I -- I suppose so, yes.

HBHQTUZ5

Smyth - Cross

1 Q. Now, you'd also agree that in the case of each person that  
2 you lied to and deceived, sir, you conned those people into  
3 believing the lies that you told were the truth, right?

4 A. Yes.

5 Q. And by conning, you would agree that what you did with  
6 people that you deceived was to use words and to use documents  
7 to create the illusion of truth while not telling them the  
8 whole story, right?

9 A. Yes.

10 Q. And when you were conning people from 2010 to 2012, you  
11 didn't try to act in a way that would tip off to those people  
12 that you were lying, right?

13 A. Correct.

14 Q. I mean, you tried to act sincere, right?

15 A. Yes.

16 Q. You tried to act earnest, right?

17 A. Yes.

18 Q. You tried to act like you could be trusted, right?

19 A. Yes.

20 Q. In other words, when you were lying to people from 2010 to  
21 2012, you tried to behave just like you've been behaving here  
22 in court the past few days, right?

23 MR. WILLIAMS: Objection.

24 THE COURT: Sustained.

25 Q. Sir, you deceived a lot of intelligent professionals who

HBHQTUZ5

Smyth - Cross

1 asked for KIT digital's true financial health during this  
2 period 2010 to 2012, right?

3 A. Yes.

4 Q. You deceived KIT digital's accountants and auditors about  
5 KIT digital's true financial health during this period,  
6 correct?

7 A. Yes.

8 Q. And, sir, you believed that -- when you were on direct  
9 examination, do you recall testifying that you lied for the  
10 whole time between 2010 and 2012 to KIT digital's auditors?

11 A. Yes.

12 Q. Some of KIT digital's auditors who were deceived were Grant  
13 Thornton, right?

14 A. Yes.

15 Q. And you would agree that Grant Thornton is one of the most  
16 respected auditing firms at least in the United States, right?

17 A. Yes.

18 Q. And you had extensive communication with the auditors from  
19 Grant Thornton in that 2010 to 2012 time period, right?

20 A. Yes.

21 Q. You had phone calls with these Grant Thornton auditors  
22 during that period, right?

23 A. Yes.

24 Q. You had email exchange communications with those auditors  
25 from Grant Thornton in that time period, right?

HBHQTUZ5

Smyth - Cross

1 A. Yes.

2 Q. You had face-to-face meetings with auditors from Grant  
3 Thornton during that same time period?

4 A. Yes.

5 Q. In fact, you even socialized by going out to dinner with  
6 some of those auditors during that time period, right?

7 A. Yes.

8 Q. You acted, sir, to gain their trust, right?

9 A. Yes.

10 Q. And with all the contact and experience that these Grant  
11 Thornton auditors had, none of them ever told you that they  
12 were aware of your frauds, right?

13 A. Correct.

14 Q. Grant Thornton, while they were auditing KIT digital, had  
15 access to KIT digital's books, right?

16 A. Yes.

17 Q. In fact, Grant Thornton also had access to KIT digital's  
18 customers. Isn't that right?

19 A. Could you explain that question?

20 Q. Sure. Grant Thornton could send out letters episodically  
21 to KIT digital's customers to confirm some of the  
22 representations that you were making to Grant Thornton, right?

23 A. Yes.

24 Q. Grant Thornton's job was to confirm the accuracy of KIT  
25 digital's financial statements, right?



HBHQTUZ5

Smyth - Cross

1 A. Correct.

2 Q. And even when Grant Thornton had questions about what you  
3 were doing at KIT digital and about KIT digital's financials,  
4 you were able to throw them off the trail, right?

5 A. Yes.

6 Q. So your deception was so extensive that even though Grant  
7 Thornton worked to verify your financial representations, they  
8 weren't able to catch you lying, correct?

9 MR. WILLIAMS: Objection to the characterization.

10 THE COURT: Sustained.

11 Q. Sir, in 2011, you also deceived KIT digital's lawyers about  
12 the reasons you included restructuring fees in some of KIT  
13 digital's acquisitions, correct?

14 A. Can you tell me which lawyers? I'm a bit confused.

15 Q. OK. For example, you remember someone named Scott Ordt who  
16 was a lawyer for WWB?

17 A. Yes.

18 Q. You deceived Scott Ordt about the reasons you were  
19 including restructuring fees in the acquisition of WWB by KIT  
20 digital, right?

21 A. Yes.

22 Q. He wasn't the only lawyer that you deceived in 2011 about  
23 the reasons you were including restructuring reserves in side  
24 letters for acquisitions, right?

25 A. Correct.

HBHQTUZ5

Smyth - Cross

1 Q. You also deceived KIT digital's board of directors about  
2 KIT digital's true financial health from 2010 to 2012, right?

3 A. Correct.

4 Q. And you would agree, sir, that at least during that time  
5 period, KIT digital's board of directors included several  
6 independent people that you actually considered to be  
7 financially educated, right?

8 A. Yes.

9 Q. For example, you remember Joe Mullin, right?

10 A. Yes.

11 Q. Joe Mullin was previously a portfolio manager for a  
12 privately owned investment management firm, right?

13 A. Yes.

14 Q. And you also remember somebody named Santo Politi?

15 A. Yes.

16 Q. Santo Politi was a board member of KIT digital during this  
17 2010-2012 time frame, right?

18 A. Yes.

19 Q. And Santo Politi is another individual on the board at KIT  
20 digital that you deceived, right?

21 A. Yes.

22 Q. And you recall that Santo Politi was the founder of a media  
23 entertainment and technology focused venture fund, right?

24 A. Yes.

25 Q. And, sir, the other individual we can use as an example is

HBHQTUZ5

Smyth - Cross

1 Mr. Wayne Walker. You recall him, right?

2 A. Yes.

3 Q. Wayne Walker was a board member at KIT digital, right?

4 A. Yes.

5 Q. Wayne Walker was also a lawyer, right?

6 A. Yes.

7 Q. He was actually a named partner in his own firm, the law  
8 firm of Walker Nell Partners. Do you remember that?

9 A. Yes.

10 Q. And you also recall that Mr. Walker was previously chairman  
11 for Habitat for Humanity?

12 A. Yes.

13 Q. And you deceived him as well?

14 A. Yes.

15 Q. And you also deceived KIT's audit committee about the true  
16 financial condition of KIT digital from 2010 to 2012, right?

17 A. Yes.

18 Q. So let's delve into this a bit further. You actually  
19 deceived people who relied on you to do your job ethically and  
20 legally, right?

21 A. Yes.

22 Q. Now, you know my client, Kaleil, right?

23 A. Yes.

24 Q. You know he's not an accountant, right?

25 A. I know he's not a qualified accountant, yes.

HBHQTUZ5

Smyth - Cross

1 Q. Not any type of accountant, qualified or unqualified?

2 A. Right. Yes.

3 Q. You, on the other hand, are an accountant, right?

4 A. Yes.

5 Q. And in addition to you being an accountant, you actually  
6 deceived people who worked directly under you in the finance  
7 department at KIT digital, didn't you?

8 A. Yes.

9 Q. Those people were accountants, some of them, right?

10 A. Yes.

11 Q. People like John Clark?

12 A. Yes.

13 Q. Right?

14 People like Rich Faur?

15 A. Yes.

16 Q. Now, sir, you communicated with Mr. Clark and Mr. Faur  
17 fairly frequently when you were KIT digital's chief financial  
18 officer in the 2010 to 2012 time period, right?

19 A. Yes.

20 Q. And would you also agree that Mr. Faur and Mr. Clark had  
21 some level of a skill and experience in reviewing financial  
22 books and records?

23 A. Yes.

24 Q. And yet even though Mr. Clark and Mr. Faur were accountants  
25 who worked directly under you, you were able to conceal your

HBHQTUZ5

Smyth - Cross

1 accounting frauds from accountants, right?

2 A. Yes.

3 Q. Sir, you took an oath to tell the truth here in court. Do  
4 you recall that?

5 A. Yes.

6 Q. You also recall testifying on your direct examination that  
7 you signed certifications in connection with KIT digital's  
8 annual financial reports, the 10-Ks. Do you recall that?

9 A. Yes.

10 Q. Those certifications contain statements by you where you  
11 say that you essentially are swearing that the representations  
12 that you're making are truthful. You recall that too, right?

13 A. Yes.

14 Q. And you lied in those certifications, didn't you?

15 A. Yes.

16 Q. So, you also have experience in lying even when you've  
17 sworn to tell the truth, right?

18 A. Yes.

19 Q. Sir, even before you were arrested, you were concerned  
20 about getting caught for the crimes that you've pled guilty to,  
21 right?

22 A. Yes.

23 Q. To say that you were fearful about being caught for the  
24 crimes that you committed would also be accurate, right?

25 A. Yes.

HBHQITUZ5

Smyth - Cross

1 Q. You were fearful about being caught because you knew the  
2 consequences would be severe, right?

3 A. Yes.

4 Q. And in September 2015, your fear became a reality because  
5 that's when you were apprehended by authorities of the United  
6 States while you were in Australia, right?

7 A. Correct.

8 Q. And you were arrested in Australia because you had been  
9 indicted here in the United States, right?

10 A. Correct.

11 Q. And the U.S. Government sought what's called extradition;  
12 in other words, to have you brought back from Australia to the  
13 United States so you could be processed here. Do you recall  
14 that?

15 A. Yes.

16 Q. And when you were in Australia, it wasn't an instant  
17 turnaround where you got to come immediately to Australia  
18 (sic). You actually stayed at some prisons when you were in  
19 Australia. Isn't that right?

20 A. Correct.

21 Q. In fact, you stayed at multiple prisons when you were in  
22 Australia, didn't you?

23 A. Yes.

24 Q. You stayed in three prisons in Australia, right?

25 A. Correct.

HBHQTUZ5

Smyth - Cross

1 Q. Three prisons around Melbourne, in that area, right?

2 A. Correct.

3 Q. All right. And, in fact, you were incarcerated in  
4 Australia for about two months. Do you recall that?

5 A. Yes.

6 Q. Then, finally, you were extradited to the United States  
7 late in 2015, right?

8 A. Yes, the 5th of November.

9 Q. OK. Now, Australian prison, that was unpleasant, wasn't  
10 it?

11 A. Yes.

12 Q. It's the first time you had ever been arrested, right?

13 A. Correct.

14 Q. You'd never been locked up before, right?

15 A. Correct.

16 Q. It was pretty scary for you, wasn't it?

17 A. It was.

18 Q. But then you got extradited to the United States, right?

19 A. Yes.

20 Q. When you first arrived in the United States, you were  
21 booked in the Metropolitan Correctional Center, right?

22 A. Correct.

23 Q. You felt out of place?

24 A. Yes.

25 Q. Again, you were terrified?

HBHQTUZ5

Smyth - Cross

1 A. You could say that, yeah.

2 Q. And you felt like you didn't belong there for the crimes  
3 that you had committed, right?

4 A. No, I don't think that's true.

5 Q. Oh, so you felt at that point when you were locked up in  
6 the United States that you deserved to be there?

7 A. I'd done things wrong, yes.

8 Q. Oh, OK, but you did ask to get released though?

9 A. Yes.

10 Q. OK. So you felt that the conditions at the Metropolitan  
11 Correctional Center were actually worse than the conditions of  
12 confinement you had in Australia, right?

13 A. Yes.

14 Q. You were incarcerated at the MCC in New York for six  
15 months. Isn't that right?

16 A. Correct.

17 Q. And you desperately wanted to see your family again, right?

18 A. Yes.

19 Q. You desperately wanted to get back to Australia, right?

20 A. I wanted to get back to Australia, yes.

21 Q. Desperately?

22 A. Well, yes.

23 Q. And the government offered you the opportunity to reduce  
24 your prison exposure if you would agree to cooperate in this  
25 case, right?



HBHQTUZ5

Smyth - Cross

1 MR. WILLIAMS: Objection, your Honor.

2 THE COURT: Grounds.

3 MR. WILLIAMS: Foundation.

4 THE COURT: Overruled.

5 A. The government made no representation of an offer to me.

6 Q. Sir, there was never a time at any point when you were  
7 incarcerated where or after you were released from  
8 incarceration --

9 THE COURT: Well, which is it?

10 MR. McRAE: We'll go with the latter, OK?

11 Q. After your release, was there ever a point -- actually,  
12 let's go back. That's a good place. Let's start at the  
13 beginning.

14 While you were incarcerated, you had no communications  
15 with the government about entering into a cooperating plea  
16 agreement?

17 A. Yes, I did. Yes, I entered a cooperating plea agreement.  
18 Yes.

19 Q. And you understood that the cooperation part meant  
20 cooperation in the prosecution of this case, right?

21 A. I did.

22 Q. You also understood that when you were arrested in  
23 September of 2015, you were shown a copy of the indictment in  
24 the case, weren't you?

25 A. Yes.

HBHQ TUZ5

Smyth - Cross

1 Q. Sir, the indictment at that point only charged two  
2 defendants, right, you and Kaleil?

3 A. Correct.

4 Q. So using deductive reasoning, right, at that point you  
5 understood since there were only two names on the indictment  
6 that in order for you to cooperate, you would have to cooperate  
7 against Kaleil because you couldn't cooperate against yourself,  
8 right?

9 THE COURT: Sustained. It's a complicated question.

10 Q. You understood at that point that in order for you to  
11 cooperate, you would have to cooperate against Kaleil, correct?

12 MR. WILLIAMS: Objection. Lay a foundation.

13 THE COURT: Sustained.

14 Q. Sir, when you saw the indictment had only two names, let's  
15 start with that. You were just testifying momentarily that you  
16 saw the indictment had two names on it, yours and Kaleil's?

17 A. Yes.

18 Q. You knew at that point that if you were going to cooperate  
19 in the case, you'd have to cooperate against Kaleil, right?

20 A. Yes.

21 Q. OK. Now, in May -- excuse me -- in March of 2016, you pled  
22 guilty to all five counts charged against you in the  
23 indictment, right?

24 A. Yes.

25 Q. On direct examination, you were asked about the crimes that

HBHQTUZ5

Smyth - Cross

1 you committed. Do you remember that?

2 A. Yes.

3 Q. But you responded by telling us what you were charged with.  
4 Do you remember how you said that? That you were charged with  
5 conspiracy to commit security fraud and accounting fraud. Do  
6 you remember that?

7 A. I don't really remember, no.

8 Q. Let's parse that distinction. You understand the  
9 difference between saying that you're charged with and what you  
10 did, right?

11 A. Yes.

12 Q. Because when you say what you're charged with, that's a way  
13 of talking about what you are accused of without actually  
14 admitting it, right?

15 A. Yes.

16 Q. But just to clarify, you weren't just charged with the  
17 crimes that you described; you committed the crimes that you  
18 described, right?

19 A. I did.

20 Q. OK. Now, sir, you have not been sentenced for your crimes  
21 yet, have you?

22 A. No, I haven't.

23 Q. And prior to being arrested in September 2015, you were  
24 hoping that if you were arrested, that you would just be happy  
25 to serve two years in prison. Do you remember that?

HBHQTUZ5

Smyth - Cross

1 A. I don't remember that, no, sorry.

2 Q. You know Gavin Champion, right?

3 A. I do know Gavin Champion.

4 Q. Gavin Champion has been to your house in Australia, hasn't  
5 he?

6 A. He has.

7 Q. I should be specific. He's been to one of your houses in  
8 Australia. Isn't that right?

9 A. Yes.

10 Q. Now, between 2015 -- 2012 after you left KIT digital and  
11 2015 when you were arrested, you had a number of conversations  
12 with Gavin Champion in Melbourne Australia. Isn't that right?

13 A. Yes.

14 Q. One of the conversations that you had actually took place  
15 at your house. Isn't that right?

16 A. I had conversations with Gavin at my house, yes.

17 Q. Right. And didn't you tell prosecutors in one of the  
18 meetings that you had, which we'll get to, on June 3, 2016 --  
19 excuse me, actually, didn't you tell Gavin Champion that if  
20 essentially you got caught that you would be happy to serve two  
21 years in prison?

22 A. I don't remember that. Sorry.

23 MR. McRAE: Let me show you a document, not to publish  
24 it, just for the witness to see it, for counsel and for the  
25 Court and it's KIT Exhibit 4089.

HBHQ TUZ5

Smyth - Cross

1 Q. Sir, I'm going to ask you to take a look at the second and  
2 third page. If you look in the -- it's not a full paragraph  
3 but it's the top paragraph on the third page. I just want you  
4 to read that to yourself, and I just want you to tell me  
5 whether this refreshes your recollection as to whether you ever  
6 told Gavin Campion in that time period that I gave you that you  
7 would settle for two years in jail?

8 A. Yes.

9 Q. OK. Very well. So you recall that now?

10 A. I don't recall it, but --

11 THE COURT: So the answer is no. He's going to ask  
12 you questions. He's going to show you documents and ask you  
13 whether it refreshes your recollection or not. So that's a  
14 yes-or-no question.

15 If it does refresh your recollection, you'll say,  
16 "Yes, It refreshes my recollection." If it doesn't refresh  
17 your recollection, then you need to say no.

18 So what's your answer?

19 THE WITNESS: No.

20 Q. Great. OK. Thank you, sir.

21 Sir, you did understand though that at the time that  
22 you pled guilty in this case that as a result of the crimes  
23 that you committed, you faced a maximum sentence of 85 years in  
24 prison?

25 A. Yes.

HBHQTUZ5

Smyth - Cross

1 Q. 85 years in prison must have been a shocker for you, right?

2 A. It was.

3 Q. Now, in addition to this 85 years in prison time as a  
4 maximum that you were facing, you also faced the threat of a  
5 considerable fine. Isn't that right?

6 A. Correct.

7 Q. In fact, you faced more than a \$5 million fine as a result  
8 of the crimes to which you pled guilty, right?

9 A. Yes.

10 Q. Now, sir, do you recall testifying on direct examination  
11 that when you were lying and making false records about KIT  
12 digital, you felt pressure?

13 A. Yes.

14 Q. So pressure made you lie from 2010 to 2012?

15 A. The pressure didn't make me lie.

16 Q. But pressure was part of what you were experiencing in 2010  
17 to 2012 when you lied about KIT digital, right?

18 A. I think the pressure was -- I was -- from memory, from my  
19 evidence the pressure was near the end when in 2012 I said I  
20 was under extreme pressure, yes.

21 Q. Sir, didn't you say that you were working 18 hour days?

22 A. Yes, but --

23 Q. No, just a yes or no.

24 A. Sorry. Yes.

25 Q. Is it your -- and it's your testimony that working an

HBHQTUZ5

Smyth - Cross

1 18-hour day didn't impose any pressure on you at all?

2 THE COURT: No. No. Sustained. Sustained. That  
3 wasn't his testimony.

4 MR. McRAE: That's why I'm asking I want to clarify.  
5 That's precisely my point.

6 Q. Working 18 hours a day did cause you to experience  
7 pressure, didn't it?

8 A. Not pressure, no. I was -- I was not -- I was tired and it  
9 was -- not pressure what I would say.

10 Q. No pressure, OK. So you would have to agree though, sir,  
11 that from the moment that you found out about the prospect of  
12 serving 85 years in prison, you felt pressure then though,  
13 didn't you?

14 A. I felt -- pressure is not the word I would use, no.

15 Q. I want to understand this. So the times that you were  
16 sitting in prison in Australia and in New York, you certainly  
17 felt pressure then, didn't you, sir?

18 A. I -- I can't -- I don't know what pressure relates to that.  
19 I didn't feel good about myself, and I didn't feel I was in a  
20 good situation, yes.

21 Q. You testified within the last 15 minutes that when you were  
22 locked up in Australia for months, you had never been locked up  
23 before, right?

24 A. No.

25 Q. And your testimony is that you spent two months in prison

HBHQTUZ5

Smyth - Cross

1 where you had never been before, and you didn't feel pressure?

2 A. I felt scared.

3 Q. But no pressure?

4 A. Well, I -- I'm struggling to find out what the pressure --  
5 yeah, well, you could call it pressure, but -- yes.

6 Q. Is trying to maintain survival pressure?

7 A. Yeah, there it -- yes, OK. If you put it that way, yes,  
8 OK.

9 Q. And, sir, you testified on direct examination that you also  
10 spent time in prison in New York, right?

11 A. Yes.

12 Q. And you said just a few moments ago that the conditions at  
13 the MCC in New York were worse than the conditions in  
14 Australia, right?

15 A. Yes.

16 Q. And you spent twice as long in the New York prisons as you  
17 did in the prisons in Australia, right?

18 A. Yes.

19 Q. And you felt pressure then too, didn't you, sir?

20 A. Yes.

21 Q. Yeah. Every second that you contemplate the 85 years in  
22 prison that you could be facing is an instance of pressure that  
23 you feel. True or false?

24 A. True.

25 Q. Now, sir, you also said that during your direct examination



HBHQ TUZ5

Smyth - Cross

1 that part of the reason you committed fraud at KIT digital was  
2 to make money. Do you remember that?

3 A. Yes.

4 Q. So while you were committing frauds from 2010 to 2012,  
5 making money was a goal that you had, right?

6 A. I wanted to make money, yes.

7 Q. So from 2010 to 2012, you were willing to lie in order to  
8 achieve something that was more important to you than telling  
9 the truth, right?

10 A. Yes.

11 Q. And as you sit here, your desire to avoid jail is greater  
12 than any desire that you ever had to make money, right?

13 A. No, I wouldn't say that.

14 Q. Really?

15 A. Yeah.

16 Q. So for all the money that you got from frauds when you were  
17 committing them, your testimony is that you wouldn't trade  
18 every cent of that right now if you didn't have to spend  
19 another second in prison?

20 A. I'd trade that money, yes.

21 Q. Now, sir, when the prosecutors conditioned your plea  
22 agreement on your willingness to cooperate, they also required  
23 that you be truthful, right?

24 A. Correct.

25 Q. Right. But by your own admission, being truthful is

HBHQITUZ5

Smyth - Cross

1 something that you've struggled with for years prior to your  
2 arrest, right?

3 A. I had issues telling the truth at KIT digital, yes.

4 Q. I'll adopt your parlance. Issues. OK.

5 Now, sir, you also recall on direct examination that  
6 it was elicited from you that you had an understanding of what  
7 would happen to you as far as your plea agreement if you lied,  
8 right?

9 A. Correct.

10 Q. And do you recall testifying that it was your understanding  
11 that if you lied in connection with your cooperation in this  
12 case, that that would relieve the government of its  
13 obligations?

14 A. Yes.

15 Q. But, sir -- and in saying that, that it would relieve the  
16 government of its obligations, just to put that in the simplest  
17 terms, if you lied in connection with your cooperation in the  
18 case, the government would have no obligation to recommend a  
19 sentence be in light of or commensurate with whatever  
20 cooperation you gave. You understand that, right?

21 A. Yes.

22 Q. But, sir, in your case at least, knowledge that you could  
23 go to jail for lying, that doesn't prevent you from lying, does  
24 it?

25 THE COURT: Do you understand the question?

HBHQITUZ5

Smyth - Cross

1 THE WITNESS: No, I don't understand.

2 Q. OK. Let me put a finer point on it. OK?

3 All the years that you were committing fraud when you  
4 were at KIT digital before you were arrested, you knew that you  
5 could go to jail for committing those crimes, right?

6 A. Yes.

7 Q. You didn't need a federal prosecutor to tell you if you  
8 commit those crimes between 2010 and 2012, you could go to  
9 jail. You knew that, right?

10 A. Yes.

11 Q. You didn't need an FBI agent to tell you that either?

12 A. No.

13 Q. No one had to write down 85 years maximum sentence on a  
14 sheet of paper for you to know something that you probably knew  
15 while you were in high school, which is hopefully that if you  
16 committed a crime, you could go to jail, right?

17 A. Yes.

18 THE COURT: Sustained.

19 Q. Now, sir, even though you knew you could go to jail for  
20 lying while you were committing those crimes at KIT digital,  
21 that didn't stop you from lying about KIT digital's true  
22 financial picture, right?

23 A. Correct.

24 Q. So, sir, is it fair to say then that from 2010 to 2012,  
25 your desire to commit fraud was greater than your fear of going

HBHQTUZ5

Smyth - Cross

1 to jail?

2 A. Yes.

3 Q. And from 2010 to 2012, your belief that you were a good  
4 liar was stronger than your fear that you might go to jail,  
5 right?

6 A. You could say that, yes.

7 Q. And, sir, your belief that you're a good liar after years  
8 of conning people is still stronger than your fear that you  
9 might go to jail now, isn't it?

10 A. No.

11 Q. OK. Now, in exchange for your testimony against Kaleil in  
12 this criminal case, the government provided you with a plea  
13 agreement, right?

14 A. Yes.

15 Q. And in that plea agreement, it's your understanding that if  
16 certain conditions are met by you, that the prosecutors will  
17 offer to recommend a reduced sentence, right?

18 A. I believe they're going to give the letter to Judge  
19 Gardephe on the details of my cooperation, and it's up to the  
20 Judge what he would do.

21 Q. But when you say "the letter," sir, the letter that you're  
22 talking about is a recommendation of a reduced sentence if it's  
23 deemed that you have substantially assisted the prosecution in  
24 this case?

25 THE COURT: It's too complicated. You've got to break

HBHQTUZ5

Smyth - Cross

1 it down.

2 MR. McRAE: Certainly.

3 Q. Sir, are you familiar with what's known as a 5K letter?

4 A. I've heard of the letter, yes.

5 Q. And you know that in order to get -- let's to make sure  
6 that we are communicating about the same thing.

7 The 5K letter is the letter referred to in your plea  
8 agreement as the potential, let's say, recommendation of a  
9 reduced sentence reflecting your cooperation, correct?

10 A. I believe it's a letter that -- my understanding is that it  
11 is a letter that details the extent of my cooperation which  
12 will be addressed to Judge Gardephe.

13 Q. You know that in order to get the prosecutor's 5K letter,  
14 it may not be enough for you to just tell everything that you  
15 know in this case, right?

16 A. Can you clarify?

17 Q. Sure. You understand that you will not receive a 5K letter  
18 unless the prosecutors have concluded that you provided them  
19 with substantial assistance in their prosecution against  
20 Kaleil, correct?

21 A. I don't know that that sort of -- I'm aware that I need to  
22 give all -- speak truthfully, give all the evidence I have and  
23 help them in telling them about the crimes I've committed with  
24 other people.

25 Q. And you also understand that it means that if your

HBHQITUZ5

Smyth - Cross

1 information is not substantially useful in their eyes, you will  
2 not get that 5K letter, right?

3 A. I -- I would have thought it would have -- to get the  
4 cooperation agreement I -- I spoke -- we spoke to the  
5 government, so I mentioned that they base the cooperation  
6 agreement on information I was supplying.

7 Q. Yeah, I want to -- let me ask you a specific question here,  
8 sir. Do you understand the words "substantial assistance"  
9 being part of the language in your plea agreement?

10 A. I don't know -- I can't remember substantial was in the  
11 plea agreement, but I assume that you're right.

12 MR. McRAE: Let me show you Government Exhibit 3516-18  
13 which has been admitted.

14 Sir, why don't we turn to page 3. Why don't we go to  
15 the third full paragraph. Actually, let's go to the second  
16 full paragraph, my apologies, starting with the sentence that  
17 begins "in addition." It is in the middle of the paragraph and  
18 you can go over to the right and it starts off "in addition."  
19 Thank you.

20 Q. Sir, I just want to read this out loud.

21 "In addition, if this Office determines that the  
22 defendant has provided substantial assistance in an  
23 investigation or prosecution, and if he has fully complied with  
24 the understandings specified in this agreement, this office  
25 will file a motion, pursuant to Section 5K1.1 of the U.S.

HBHQTUZ5

Smyth - Cross

1 Sentencing Guidelines, requesting the Court to sentence the  
2 defendant in light of the factors set forth in Section  
3 5K1.1(a)(1)-(5).

4 Sir, my question to you is, you've read this language  
5 before?

6 A. Yes.

7 Q. And you do understand that the prosecutors, and the  
8 prosecutors alone, decide whether you've given substantial  
9 assistance, right?

10 A. Yes.

11 Q. And, sir, you're hoping that as a result of your testifying  
12 against Kaleil, that you don't have to spend another moment in  
13 jail, right?

14 A. I'm hoping with everything I've done in giving them  
15 evidence, yes, I'd like not to spend time in jail, yes.

16 Q. And you're highly motivated to show the prosecutors your  
17 willingness to provide substantial assistance by testifying  
18 against Kaleil, correct?

19 A. I'm going to do everything I can to tell the truth and give  
20 them all the evidence I can, yes.

21 Q. You're going to do everything humanly possible. Isn't that  
22 right?

23 A. No.

24 Q. Sir, you didn't have to guess at the information the  
25 government wanted from you, right?

HBHQTUZ5

Smyth - Cross

1 A. No.

2 Q. In numerous meetings before you testified in this case, the  
3 prosecutors told you all the areas that they wanted you to  
4 address in your testimony, right?

5 A. Could you repeat that question?

6 Q. Certainly. In the numerous meetings that you had with  
7 prosecutors before you came in and testified on direct  
8 examination, the prosecutors told you all the areas that they  
9 wanted you to address in your testimony, correct?

10 A. They asked me questions about my -- what was my evidence,  
11 yes.

12 Q. And you did meet with the prosecutors and other law  
13 enforcement at least 29 times since you were arrested  
14 September 2015, right?

15 A. I believe that's correct, yes.

16 Q. And the 29 meetings that you talked about on direct  
17 examination didn't include discussions that you had with  
18 Mr. Williams or other prosecutors during breaks on your direct  
19 examination, right?

20 MR. WILLIAMS: Objection. Confusing.

21 THE COURT: Sustained. Sustained.

22 Q. So, sir, even after all of these meetings -- let's talk  
23 about who attended the meetings. Let's talk about the  
24 prosecutors first.

25 Mr. Williams was one of the prosecutors at those 29



HBHQTUZ5

Smyth - Cross

1 meetings or so, correct?

2 A. Yes.

3 Q. AUSA Andrea Griswold was also at those meetings, some of  
4 them at least?

5 A. Some of the meetings, yes.

6 Q. I used an acronym. I said AUSA. It's Assistant United  
7 States Attorney. Assistant United States Attorney Joshua  
8 Naftalis was also at some of the meetings you had with the  
9 prosecutors, correct?

10 A. Yes.

11 Q. You also had meetings attended by some prosecutors who are  
12 not even present in the courtroom, like Ed Kim, correct?

13 A. I can't remember that name.

14 Q. You also met with FBI agents in a number of these meetings  
15 that you recalled with the prosecutors, correct?

16 A. Yes.

17 Q. As well as agents of the United States Postal Service  
18 Inspection, correct?

19 A. Yes.

20 Q. You recall meeting with a Postal Inspector Melissa Atkin?

21 A. Yes.

22 Q. In your meetings with prosecutors, there were also times  
23 when attorneys from the Securities and Exchange Commission were  
24 present, right?

25 A. Correct.

HBHQTUZ5

Smyth - Cross

1 Q. Now, sir, just last month you met with the prosecutors  
2 three times a week, right?

3 A. I don't know the exact dates, but, yes, I met regularly.

4 Q. Do you recall testifying on direct examination in response  
5 to a question about how many times you'd met with the  
6 government in the last month or so, it being three times a  
7 week?

8 MR. WILLIAMS: Objection. I didn't ask the question  
9 like that.

10 A. No, I don't remember that.

11 MR. McRAE: I'll move on, your Honor.

12 Q. Sir, each of the 29 times that you met with the government  
13 approximated that those meetings were three to four hours each.  
14 Do you recall that?

15 A. Yes.

16 Q. So help me out here, Mr. Smyth. If you had 29 meetings  
17 that were three hours each, how many hours would that be?

18 A. Approximately 90.

19 Q. Right. And if you had 29 meetings at four hours each, that  
20 would be how many?

21 A. Approximately 120 hours.

22 Q. About 136, actually, right?

23 A. Sorry?

24 Q. Do you remember?

25 A. Or it's 120.

HBHQITUZ5

Smyth - Cross

1 Q. I'm sorry. What did you say?

2 A. Four hours. You said four hours meeting by 29 meetings,  
3 that's 120.

4 Q. Right. Right, if you do 29 times four, what do you have  
5 there?

6 A. 126, yeah.

7 Q. Thank you. I misspoke. I meant 126; I said 136.

8 In prior meetings that you had with the prosecutors  
9 then, we're talking about a range of 87 hours to approximately  
10 126 hours of meetings, right?

11 A. Yes.

12 Q. There were questions that the prosecutors repeated to you  
13 again and again in various meetings that you had with them,  
14 right?

15 A. Yes.

16 Q. And after the prosecutors posed questions, you would give  
17 answers, right?

18 A. Yes.

19 Q. And the prosecutors would sometimes comment on your  
20 answers, right?

21 A. Yes.

22 Q. They gave feedback on your answers, right?

23 A. Yes.

24 Q. You would discuss your answers with the prosecutors in  
25 meetings, right?

HBHQTUZ5

Smyth - Cross

1 A. Yes.

2 Q. And also there were times that when you would provide  
3 answers, that the prosecutors would tell you when they thought  
4 you were wrong, right?

5 A. Could you repeat that? Sorry.

6 Q. There were also times when you were discussing topics with  
7 the prosecutors where they told you that they thought that some  
8 of your responses were wrong, right?

9 A. I don't remember that, no.

10 Q. So it's your understanding that in approximately 87 to 126  
11 hours of meeting, there wasn't a single instance where you gave  
12 a response to a question where the prosecutor may have said to  
13 you that they thought your answer was incorrect?

14 A. It's possible. I don't remember any direct instance.

15 Q. Now, sir, isn't it a fact that the testimony that you gave  
16 on direct examination was rehearsed testimony?

17 A. I was aware of the questions that -- a lot of the questions  
18 I would be asked, yes.

19 Q. Would you agree that there's a difference between being  
20 aware of a question and an answer and rehearsing it repeatedly  
21 through meetings so that your testimony is rehearsed?

22 A. Yes, OK.

23 Q. Now, let's just go over a couple of examples, sir. You  
24 testified over two days that Kaleil conspired with you. Do you  
25 recall that?

HBHQTUZ5

Smyth - Cross

1 A. Yes.

2 Q. You also testified on direct examination that you lied to  
3 investors all the time during the two and a half years that you  
4 were committing fraud, right?

5 A. Yes.

6 Q. And yet, sir, you also testified that Kaleil was one of the  
7 largest investors in KIT digital during the same period, right?

8 A. Yes.

9 Q. So your testimony about lying to investors all the time, so  
10 that was just rehearsed testimony you gave because you thought  
11 it would please the prosecutors, right?

12 MR. WILLIAMS: Objection to all the characterizations.

13 THE COURT: Sustained.

14 Q. Sir, you actually learned some of your answers by heart in  
15 these preparation sessions. Isn't that right?

16 A. I remembered some answers, yes.

17 Q. Sir, do you remember that you were shown three photographs  
18 during your direct examination of three different individuals?

19 A. Yes.

20 Q. Do you remember that you were asked to identify each one of  
21 those individuals?

22 A. Yes.

23 Q. Do you recall being asked: How do you recognize the  
24 individual in the photograph?

25 A. Yes.

HBHQTUZ5

Smyth - Cross

1 Q. Do you recall that you gave the same answer three times,  
2 which was "I've met the person many times and that's a  
3 photograph of that person"?

4 A. Yes.

5 Q. The reason that you gave the identical answers in response  
6 to those questions is because that was rehearsed testimony.  
7 True or false.

8 A. No, it's because there were photographs and it was the same  
9 answer.

10 Q. Sir, your rehearsals with the prosecutors is also the --

11 THE COURT: Sustained.

12 MR. WILLIAMS: Objection.

13 Q. Your preparation sessions with the prosecutors is also the  
14 reason you keep saying "we" so many times in response to  
15 questions about what you did, right?

16 THE COURT: Sustained.

17 Q. Sir, in some of your meetings, the prosecutor showed you  
18 documents, right?

19 A. Yes.

20 Q. And you recall that you were asked whether you had seen all  
21 the evidence in the case, right?

22 A. Yes.

23 Q. And you said no, right?

24 A. Correct.

25 Q. Now, it's your understanding that at a minimum, there are

HBHQTUZ5

Smyth - Cross

1 other witnesses testifying in this case other than you, right?

2 A. Correct.

3 Q. So it wouldn't surprise you that you haven't seen evidence  
4 that has nothing to do with you, right?

5 A. Correct.

6 Q. Before you testified in court on direct examination, it was  
7 your understanding that the prosecutors did show you all the  
8 evidence in this case that they wanted you to see. Correct?

9 MR. WILLIAMS: Objection.

10 THE COURT: Sustained.

11 Q. Sir, the prosecution during your direct examination -- let  
12 me rephrase the question.

13 There wasn't a single document that you were shown  
14 during your direct examination that you had not previously seen  
15 in preparation sessions with the prosecutors, correct?

16 A. Correct.

17 Q. And in your dozens of meetings with the prosecutors, they  
18 also tried to refresh your memory of events with documents?

19 A. I would -- yes. I looked at documents, yes.

20 Q. And even after anywhere from 87 to 126 hours of meeting,  
21 there were still instances that you couldn't --

22 THE COURT: I'm sorry, I'm confused about the 126. Is  
23 that 29 times four?

24 MR. WEITZMAN: 116.

25 MR. McRAE: I got three different numbers here. I'm

HBHQITUZ5

Smyth - Cross

1       sorry, 116.

2               THE COURT:   There's a reason why we went to law  
3       school.

4               MR. McRAE:   Amen to that.

5               THE COURT:   Go ahead, sir.

6               MR. McRAE:   Thank you.

7       Q.   I don't want to over -- I don't want to inflate it.  It was  
8       116.  OK, I will just say over a hundred.

9               Sir, in the 87 to over a hundred hours that you met  
10       with the prosecutors, notwithstanding all of those meetings,  
11       there were still times that you couldn't recall the specific  
12       dates of meetings within even a year, like the best that you  
13       could do was like 2011 in some instances, right?

14              MR. WILLIAMS:  Objection.  Break that down.

15              THE COURT:   Sustained.

16       Q.   Sir, weren't there instances where the best that you could  
17       do to recall when a communication occurred is to say the year  
18       that it occurred without knowing the day or the month?

19              MR. WILLIAMS:  Objection.  Unclear if he is asking him  
20       about his testimony on direct or in preparation sessions with  
21       the government.

22       Q.   I'm asking about your testimony on direct.

23              THE COURT:   You're asking him about his testimony on  
24       direct whether there were times that he was only able to date  
25       it by year?



HBHQ TUZ5

Smyth - Cross

1 MR. McRAE: Correct.

2 THE COURT: You can answer that.

3 A. Is there a specific -- I can't remember the specific  
4 examples. I may have said 2011, but I may have -- maybe, yes.  
5 I don't know.

6 Q. And, sir, isn't it also true that in your preparation  
7 sessions with the prosecutors, you were shown documents that  
8 you had no knowledge about?

9 A. Yes.

10 Q. In addition to attempting to prepare you by meeting with  
11 you upwards to more than a hundred hours, there were instances  
12 where the prosecutors were actually giving you new information,  
13 right?

14 MR. WILLIAMS: Objection. Specificity, please.

15 MR. McRAE: I think the witness knows what he didn't  
16 know before and what was supplied to him.

17 THE COURT: I'll sustain the objection. New  
18 information is incredibly broad.

19 Q. Let's telescope it.

20 Isn't it true, sir, that in these numerous meetings  
21 that you had with prosecutors there were instances when they  
22 supplied you with new information; in other words, information  
23 that you didn't possess prior to those meetings about  
24 allegations at KIT digital?

25 A. I --

HBHQTUZ5

Smyth - Cross

1 MR. WILLIAMS: Objection.

2 THE COURT: I'm sorry?

3 MR. WILLIAMS: Same objection, your Honor.

4 THE COURT: About allegations at KIT digital? I don't  
5 understand what that means.

6 MR. McRAE: Well, the allegations being in the  
7 charging instrument.

8 THE COURT: Could you rephrase the question, please?

9 MR. McRAE: Yes.

10 BY MR. McRAE:

11 Q. Sir, isn't it true that the prosecutors supplied you in  
12 some instances with information that you did not have before  
13 you met with them?

14 A. I can't recall what that would mean.

15 Q. Do you recall just a couple of days ago the prosecutors  
16 showing you a December 31, 2008 agreement that involved Maiden  
17 Capital?

18 A. Yes.

19 Q. You testified that before the prosecutors showed you that  
20 document relatively recently. You had never seen it before,  
21 right?

22 A. Correct.

23 Q. That would be an example, sir, wouldn't it, of the  
24 prosecutors giving you new information that you didn't have  
25 before, right?

HBHQTUZ5

Smyth - Cross

1 A. I hadn't seen that document, no.

2 Q. Now, sir, you don't know yet whether you're going to get  
3 the 5K1 letter, right?

4 A. Correct.

5 Q. Now, you do know that you have already received numerous  
6 benefits in exchange for your agreement to cooperate even  
7 before you testified on direct examination, right?

8 A. Can you be specific?

9 Q. Let's start with the first one. On May 4, 2016, you were  
10 released from jail, right?

11 A. I was.

12 Q. Oh, yeah.

13 MR. McRAE: Let's take a look at KIT Exhibit 4026.  
14 Just for the witness, not to be published.

15 Q. Sir, I just want you to take a look at this document. In  
16 particular, I want you to take a look at the body of it. It's  
17 brief. When you're done, you can take a look at the date in  
18 the lower left-hand corner.

19 A. Yep.

20 MR. McRAE: Your Honor, I'd like to admit KIT Exhibit  
21 4026.

22 MR. WILLIAMS: Object to relevance.

23 MR. McRAE: Your Honor, it's directly relevant.

24 THE COURT: Well, you can examine him about it and  
25 we'll see where it goes.

HBHQTUZ5

Smyth - Cross

1 MR. McRAE: Thank you, your Honor.

2 BY MR. McRAE:

3 Q. Mr. Smyth, you were released from prison on May 4, 2016,  
4 correct?

5 A. Yes.

6 Q. You were released from prison after you agreed to cooperate  
7 against Kaleil, right?

8 A. After I had a cooperation agreement, yes.

9 Q. Right. And, sir, you would agree that being released from  
10 jail, that that was a benefit to you, wasn't it?

11 A. Yes.

12 Q. Now, sir, that release from jail is not disclosed in your  
13 plea agreement, is it?

14 A. Sorry. Can you explain the plea agreement?

15 Q. In other words, sir, your release from jail is a benefit  
16 that you received before you even testified on direct  
17 examination that is not disclosed in your plea agreement?

18 A. Right.

19 MR. WILLIAMS: Objection, your Honor, the plea  
20 agreement --

21 THE COURT: Sustained. It's a compound question.

22 Q. Sir, your release from jail is not disclosed in your plea  
23 agreement, is it?

24 A. No.

25 Q. Thank you.

HBHQ TUZ5

Smyth - Cross

1 MR. McRAE: Your Honor, I note that it is, at least by  
2 my watch, perhaps 2:30.

3 THE COURT: Ladies and gentlemen, we will adjourn for  
4 the day. As you know, we are not sitting next week. So Happy  
5 Thanksgiving.

6 Don't discuss the case with anybody. Keep an open  
7 mind. There's more evidence.

8 We will resume on the following Monday at 9:30. Have  
9 a pleasant holiday. Thank you all very much.

10 (Jury excused)

11 (Continued on next page)  
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25

HBH9TUZ6

1 (Jury not present)

2 THE COURT: You may step down, Mr. Smyth.

3 (Witness excused)

4 MR. McRAE: Your Honor, I don't know we never  
5 discussed rules about walking in the well without permission.

6 THE COURT: I don't like lawyers to walk around  
7 because I think it's a distraction.

8 MR. McRAE: Yes.

9 THE COURT: So if you wouldn't mind I would ask you to  
10 stay at the podium.

11 MR. McRAE: Right.

12 THE COURT: When you're questioning the witness.

13 MR. McRAE: Perfectly. But it's okay, it's less  
14 circuitous for me to go this way to get back when the jury is  
15 out.

16 THE COURT: Oh, no. Of course. Absolutely.

17 Please be seated.

18 So, we have the Lyter Daubert hearing on Monday.

19 MR. WEITZMAN: Yes, your Honor. And I have materials  
20 for your Honor and the government.

21 THE COURT: And I think I told you we would start at  
22 9:30. I think my preference would actually be 10.

23 MR. WEITZMAN: That's acceptable.

24 THE COURT: So we will proceed at 10 a.m. on Monday  
25 with a Daubert hearing concerning Mr. Lyter.

HBH9TUZ6

1           And Mr. Weitzman are you going to give me now what  
2           you've provided to the government.

3           MR. WEITZMAN: I have a copy for you and for the  
4           government, your Honor, if I can just explain one thing.

5           There were many exchanges we had with the government  
6           where, as you know, they've said that they can't understand  
7           anything we've provided. It's been our position, as you also  
8           know, your Honor, that we don't believe we're obligated to  
9           produce a report under the rules; that we produced the summary  
10          of his testimony, anticipated testimony and the data.

11          As a result of the government's continued statements  
12          that they do not understand what he's done, we produced last  
13          night -- we asked Dr. Lyter to finalize a report. And we  
14          produced it to the government last night. And it's within that  
15          binder. It was signed just yesterday, your Honor. So we  
16          produced it as soon as it was signed. It's what's marked as  
17          KIT Exhibit 10,004. That will contain not just the report,  
18          which was a summary of his anticipated testimony, but all of  
19          the data that we previously provided to the government. There  
20          is nothing new in the report that had not previously been  
21          disclosed to the government. I want to be clear about that.  
22          But we have provided it basically like a report that one would  
23          see in a civil case for the government's benefit as a result of  
24          their statements.

25          THE COURT: Now, I know there was an issue at some

HBH9TUZ6

1 point about whether the defense was going to provide merely the  
2 tests that Dr. Lyter was going to be testifying about but not  
3 related tests that he performed. Has that issue been resolved?

4 MR. WEITZMAN: It has. In light of your Honor's  
5 ruling, of course, we've produced all of the data that has been  
6 generated. In addition to that, the government asked for  
7 additional data that Dr. Lyter had to go to his lab in North  
8 Carolina to generate specific to the government's request. So  
9 it's not even data that we ever intended to rely on or that we  
10 thought -- or that ever was created as part of his analysis.  
11 But we've been trying to give the government all the data that  
12 they're requesting irrespective of the federal rules.

13 And in addition I would say the government also  
14 requested that we produce all of Dr. Lyter's prior expert  
15 reports and expert testimony on this very same testing. You'll  
16 recall, your Honor, that, as part of the briefing, they alleged  
17 that Dr. Lyter has no experience or isn't known to have  
18 experience doing this type of testing. We've rebutted that  
19 with I think four or five cases where he's testified on this  
20 very issue. The government insisted that we produce a copy of  
21 his testimony. I don't think the criminal rules or, frankly,  
22 the civil rules require us to produce that, but we did produce  
23 that this week to the government, once we got permission from  
24 Dr. Lyter, and Dr. Lyter obtained permission from his other  
25 clients to release those prior reports.



HBH9TUZ6

1 THE COURT: All right. Other things we should  
2 discuss?

3 MR. NAFTALIS: No, your Honor. I don't want to  
4 belabor but the point is that it's been months. We were asking  
5 for things that should have been disclosed. And now we get  
6 them. So we think this just reveals that everything was held  
7 back. We don't want to belabor it, but this was sort of the  
8 whole point that we were looking for the bases and reasons. We  
9 were asking for tests that our expert says if you do this right  
10 there should be all these test results. They weren't there.  
11 So we were forced to go through an interrogatory process where  
12 we were literally making them do their work. I don't think  
13 this means they've satisfied their burden. I think this means  
14 they finally did their job on November 17.

15 Also for Monday, we're just wondering how long should  
16 we budget. We're looking obviously to Mr. Weitzman.

17 THE COURT: Mr. Weitzman, how long do you think your  
18 direct will be?

19 MR. WEITZMAN: To be safe, two hours.

20 THE COURT: Two hours?

21 MR. WEITZMAN: Yes. Your Honor, do you mind? I  
22 apologize. I just want the record to be clear.

23 Nothing we produced yesterday was new data. It was  
24 data they have long been provided. So it's just not accurate  
25 to say that we've held anything back. The report was not --

HBH9TUZ6

1 was not created, it was not signed. It was not obligated to be  
2 produced. Once we got a report, we produced it. I just want  
3 the record to be perfectly clear on this because I think it's  
4 not accurate.

5 MR. NAFTALIS: Your Honor, I don't want to belabor  
6 this. I know all of us can't stand the ink expert, it's too  
7 much at this point. The point is we were asking for the bases  
8 and reasons since August and the answer we got consistently,  
9 including on Wednesday, is we don't owe you anything. They  
10 even said that after your Honor issued an opinion inviting them  
11 to offer bases and reasons and now we get it. I really don't  
12 want to belabor it. The record speaks for itself. They  
13 refused to turn anything over until mid trial. There are new  
14 things in this document. So this is not --

15 THE COURT: You mean in the report.

16 MR. NAFTALIS: In the report which they claim they  
17 don't have to give us, there's new stuff in it. So rolling  
18 expert productions about things that were incomplete is not how  
19 your Honor's ruling from August was meant to be, which is the  
20 government has to keep shaking the tree. It's supposed to come  
21 out in good faith so that we can interpret it. We had to hire  
22 someone to figure it out and teach their expert what they  
23 should have done so we could figure out what they did.

24 And to be clear, as a result of our shaking the tree,  
25 Dr. Lyter has now withdrawn one of his opinions. So now we're

HBH9TUZ6

1 down to allegedly eight documents are fake as opposed to 21 or  
2 whatever -- as opposed to the nine initially.

3 And we also wanted to just clarify: Are they going to  
4 argue that based on the eight down from nine all the books are  
5 fake? Because we're sort of trying to figure out what the  
6 relevance of his testimony is to the case because we think  
7 that's a real bootstrap to say I tested a couple of pages and  
8 now I'm going to argue -- let's assume it's even admissible,  
9 but if that's the position they're taking.

10 THE COURT: Just so I'm clear, so you want to know  
11 from the defense whether they're arguing that the notebooks in  
12 their entirety or phony or just the eight pages?

13 MR. NAFTALIS: Dr. Lyter has not said in his report  
14 that all the notebooks are fake. They sort of picked out 21.  
15 He could only reach conclusions apparently that less than --  
16 about a third of them were purportedly like manufactured.  
17 We're obviously going to talk about I guess the third of them  
18 based on whatever he did.

19 But the question is: Assuming it comes in, which we  
20 don't think it's honestly admissible, are they trying to say  
21 eight of five hundred pages equals everything is fake?

22 We just don't know what the relevance of this is, or  
23 are they challenging specific pages?

24 THE COURT: Mr. Weitzman, are you going to be  
25 contending that the notebooks in their entirety are fake,

HBH9TUZ6

1 whatever that means?

2 MR. WEITZMAN: We've never suggested that so I'm not  
3 sure.

4 THE COURT: So you're contending that there's certain  
5 pages, and Mr. Naftalis referred to eight documents. I don't  
6 know whether that's eight pages, or is that what you mean when  
7 you say eight documents?

8 MR. NAFTALIS: They've identified pages but they  
9 haven't told us what on the page is fake. So, again, we're  
10 dancing around here. We've identified -- they give you a Bates  
11 number and say this document or this page is inconsistent with  
12 creation date to a certain date.

13 So I don't know if they're saying everything on the  
14 page is manufactured or the doodle in the corner.

15 I mean they're going to say that there are a bunch of  
16 holes punched in the document, go look at the holes punched.  
17 But we don't know which ones -- what they're really saying.

18 MR. WEITZMAN: Your Honor, I'm sorry. I find some of  
19 these.

20 THE COURT: Don't tell me what you think of it. Just  
21 tell me whether you're going to be arguing that whole pages are  
22 manufactured or whether your theory is that little additions  
23 were made.

24 MR. WEITZMAN: What we're going to say is that the ink  
25 that was tested on those pages was placed within the two years

HBH9TUZ6

1 prior to the ink testing date. We're not in a position to say  
2 whether entire pages are fabricated. The point being that  
3 the --

4 THE COURT: So you picked and -- I guess did you -- so  
5 the defense picked and chose what ink to -- what ink excerpts  
6 to test? Is that what happened?

7 MR. WEITZMAN: So I think in some instances, in most  
8 instances, he reviewed the books and chose what to test and he  
9 was trying to do almost like a random sample of pages so that  
10 he can get a sampling of them.

11 There are some pages that we had deep concerns about  
12 because we didn't think it was -- some of the entries were  
13 logical that someone who is a coconspirator would write some of  
14 the things he wrote. So there were some pages that he was  
15 directed to. But the point being if the guy on even one  
16 occasion wrote in his notebook in an effort to obtain a  
17 cooperation agreement, a false entry that is not  
18 contemporaneous when he's testified, will testify, that it's  
19 all contemporaneous, the jury is entitled to infer that he's  
20 trying to fabricate evidence against our client. We don't have  
21 to suggest --

22 THE COURT: I don't want to hear anymore.

23 Are any of the pages at issue, have they been  
24 introduced? Because there were very few pages of the notebooks  
25 that were actually introduced.

HBH9TUZ6

1 Did Dr. Lyter test any of those page that were  
2 actually introduced into evidence?

3 MR. WEITZMAN: The answer is yes. We didn't know  
4 which pages they were going to introduce when the testing was  
5 done because the testing had to be done back in 2016.

6 THE COURT: Just asking -- as you would say, it's a  
7 yes-or-no question.

8 MR. WEITZMAN: It is a yes or no.

9 THE COURT: But you can't answer it yes or no?

10 MR. WEITZMAN: I said yes. I said yes. The page with  
11 the chart, the round-tripping chart where he says Kaleil said  
12 that's a great idea.

13 THE COURT: But that wasn't introduced, sir.

14 MR. WEITZMAN: The page was.

15 THE COURT: But that entry was not introduced.

16 MR. WEITZMAN: But the page -- the page with the  
17 round-tripping chart was the one -- the round-tripping chart  
18 ink.

19 THE COURT: The chart was introduced.

20 MR. WEITZMAN: And that was tested. And it came back  
21 as having been created in the two years prior to having been  
22 turned over to the government. So our position is that's  
23 highly relevant, obviously, to a piece of evidence that's  
24 admitted by the government.

25 THE COURT: Now does the government have an expert?

HBH9TUZ6

1 And if so, are we going to hear from that person on Monday?

2 MR. NAFTALIS: We have Mr. LaPorte who also works for  
3 the Department of Justice. He will be here. We haven't  
4 decided.

5 THE COURT: You haven't decided whether to call him or  
6 not?

7 MR. NAFTALIS: We just got this in the middle of the  
8 night.

9 THE COURT: I understand.

10 MR. NAFTALIS: I would say for time planning there's a  
11 good likelihood we'll have him explain why this is wrong, but I  
12 haven't spoken to him about what's in here yet.

13 THE COURT: So for my planning purpose should I be  
14 thinking of something in the vicinity of four hours or more?

15 MR. NAFTALIS: I hope -- yes, and I hope we can keep  
16 it short. But I think for cross and for a so-called other  
17 expert, yes.

18 THE COURT: Okay.

19 Other matters we should talk about?

20 MR. JACKSON: No. Have a happy Thanksgiving, your  
21 Honor.

22 THE COURT: Same to you.

23 Mr. Weitzman, anything else?

24 MR. WEITZMAN: No, your Honor. Thank you very much.

25 THE COURT: Anything else from the government?

HBH9TUZ6

1 MR. WILLIAMS: No, your Honor. Happy Thanksgiving.

2 THE COURT: Unfortunately we'll be spending more time  
3 together before Thanksgiving, but I'll see you on Monday. Have  
4 a pleasant weekend.

5 (Adjourned to November 20, 2017 at 10 a.m.)

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## INDEX OF EXAMINATION

Examination of:	Page
-----------------	------

ROBIN SMYTH

Direct By Mr. Williams . . . . 2614

RICHARD ALAN INGRASSIA

Direct By Mr. Naftalis . . . . 2630

Cross By Mr. Weitzman . . . . 2661

Cross By Mr. Weitzman . . . . 2678

Cross By Mr. Jackson . . . . 2726

Redirect By Mr. Naftalis . . . 2732

ROBIN SMYTH

Cross By Mr. McRae . . . . . 2740

## GOVERNMENT EXHIBITS

Exhibit No.	Received
-------------	----------

2174-A, 2180-A, 2184-A through 2184-C . . .2617

3301A, 3304A, and 3301B . . . . .2646

## DEFENDANT EXHIBITS

Exhibit No.	Received
-------------	----------

KIT 3512 . . . . .2665

KIT 3514 . . . . .2674

KIT 3521 . . . . .2718

KIT 3524 . . . . .2698

KIT 3527 . . . . .2724

KIT 3546 . . . . .2716

KIT 3548 . . . . .2699